

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

IN RE:

JAZZ PHOTO CORP.,

Debtor,

. Case No. 03-26565
. Motion No.
. .
. 50 Walnut Street
. Newark, New Jersey 07102
. September 22, 2004
. 10:05 a.m.

TRANSCRIPT OF MOTION TO CONVERT CASE
BEFORE HONORABLE MORRIS STERN
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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1 THE COURT: This United States Bankruptcy Court is
2 now is session. The scheduled matters will be heard and fully
3 considered. Jazz Photo and Benun. Appearances, please?

4 MR. SIROTA: Good morning, Judge. Michael Sirota,
5 Warren Usatine and Jeffrey Traurig, Cole, Schotz, Meisel,
6 Forman and Leonard on behalf of Jazz Photo Corporation.

7 MR. GREENBERG: Good morning, Your Honor. Howard S.
8 Greenberg, Ravin Greenberg, appearing for the Creditor's
9 Committee and Jazz.

10 MR. SIROTA: Judge, I'd like the Court to note that
11 Mr. Frazza from the Budd Larner firm is in the courtroom, as
12 well as Mr. John Peterson from the Neivel Peterson firm,
13 proposed Customs counsel, and Mr. Jeffrey Kaplan, Kaplan and
14 Gilman.

15 MR. ETKIN: Good morning, Your Honor. Michael Etkin
16 and Bruce Buechler from Lowenstein Sandler on behalf of Fuji.

17 MR. ROSENTHAL: Your Honor, Lawrence Rosenthal,
18 Matthew Siegal and Douglas Mannal from Strooker.

19 THE COURT: All right. Mr. Sirota, perhaps you can
20 give us a status, as you suggested, on Jazz.

21 MR. SIROTA: Yes, Judge. Initially, we attempted
22 last evening, but apparently ECF was down for a few hours, to
23 file this August monthly operating report. I'm advised at this
24 trial this morning, and I saw Mr. Rosenthal this morning the
25 first thing in court I handed to him a copy of the August

1 monthly report. That report, Judge, is not dramatically
2 different from the July report and let me, at least, give the
3 Court some update. Since the filing -- end of August, Jazz has
4 operated at a net income of \$296,000 deposited. That's after
5 the legal fees of \$3,794,000, which is the net legal fee number
6 after allocations.

7 With respect to accounts payable, the total accounts
8 payable as of August is approximately \$3,200,000 of which
9 \$1,100,000 is owed to professionals. Of this \$2,100,000
10 amounts owed to non-professionals, 1.8 million is current,
11 leaving a balance of \$290,000 of which \$192,000 is less than --
12 I would like Mr. Frazza to provide this Court with a brief
13 update as to the -- status, and then I will ask Mr. Peterson,
14 who is proposed Customs counsel. Mr. Peterson will describe to
15 the Court what's taken place since the issuance of the ITCS
16 determination. His papers were submitted last evening, and is
17 now on the Court's calendar. Mr. Peterson, while doing work
18 for the debtor -- the submission of the def -- this Court that
19 his work has involved -- in that regard, given the fact that --
20 so, unless Your Honor has any specific questions, I'll ask Mr.
21 Frazza --

22 THE COURT: Just let me get a line on the million one
23 in professional fees not paid. How is that distributed, do you
24 know?

25 MR. SIROTA: How is it broken down?

1 THE COURT: Yes.

2 MR. SIROTA: I do have that.

3 (Pause)

4 MR. SIROTA: Budd Larner is owed 953,000, this is as
5 of -- my firm is owned 52,000; Eisner 14,000; William, Burke
6 and Carr 35,000; Ravin Greenberg 30,000; Neivel Peterson is
7 listed here as 10,000. Again, until their retention -- and
8 there a sundry items. Would you like the entire -- I can hand
9 to the Court the schedule, if you like?

10 THE COURT: That's okay. I'll take a look at it.

11 But, it's obvious that it's Budd Larner. All right. Mr.
12 Schwartz, I note your presence for the record on behalf of Mr.
13 --

14 MR. SCHWARTZ: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. SCHWARTZ: Joseph Schwartz on behalf of Jack
17 Benun.

18 THE COURT: Thank you. Mr. Frazza?

19 MR. FRAZZA: May I hand up to you a letter that was
20 -- I received from Judge Linares after I submitted my
21 affidavit? Do you mind if I approach?

22 UNIDENTIFIED SPEAKER: It was submitted the other
23 day. We filed it with the Court.

24 MR. FRAZZA: Very briefly, as usual, Your Honor,
25 while Mr. Story, who is my adversary, and I were busily

1 preparing to start the trial on September 20th, we received a
2 letter from Judge Linares indicating that because of the Speedy
3 Trial Act, he was required to start a case, which I understand
4 he started yesterday, or will be in the process of picking a
5 jury. As Your Honor saw from the letter that I was about to
6 hand up, the case is now set for January 10th, and Judge
7 Linares has fixed November 19th, for Mr. Story and I to argue
8 approximately 15 in limine motions.

9 The letter of September 15th, also, Your Honor,
10 indicates that if you had any questions, you should feel free
11 to contact Judge Linares directly, and I certainly leave that
12 up to you if you want to avail yourself of that option.

13 I'm not going to repeat, unless you think it's
14 necessary, Your Honor, what was in my affidavit. The one thing
15 I would like to do, however, is to respond, and I'm sure Mr.
16 Story, at some point in time, may be heard to three particular
17 items that I saw in his affidavit. First and foremost, there
18 is a contention that the only claims left are a fraud and a
19 RICO count. With all due respect, Count Three of our complaint
20 is a breach of contract claim covering a good faith and fair
21 dealing claim, and that claim is not dismissed as summary
22 judgment and, in fact, in their recently submitted trial brief
23 they submitted an argument as to why Hong Kong law should apply
24 and, therefore, there should not be a breach of contract claim.
25 The point, Your Honor, is, is that there is a breach of

1 contract claim.

2 Second, there is a contention that there a higher
3 standard for fraud and RICO. I agree there is a higher
4 standard to prove a fraud case. I have to be careful here,
5 because the opinion is under seal, but it was submitted to you
6 in a redacted form. If you look at Page 55 of the summary
7 judgment opinion of Judge Linares, you will see that for the
8 RICO -- State Court RICO claim, Judge Linares specifically says
9 that the standard is preponderance of the evidence. And as I
10 have submitted in my affidavit, three of the four elements of
11 the RICO claim have already been put in our column, meaning
12 that we only have to prove the four elements by a preponderance
13 of the evidence.

14 As you know, because I've been here many, many times,
15 I am very high, and the firm is very high on the RICO claim,
16 particularly, Your Honor, since it trebles the damages, and the
17 attorneys fees would also be part and parcel of any RICO.

18 Thirdly, and perhaps most importantly, there is an
19 intimation, using that word diplomatically, that Mr. Benun, in
20 some how or some way worked it -- the mediation process, and
21 then there must have been an allegation that he breached his
22 fiduciary duty in some way, shape or form.

23 Your Honor, Mark Larner and myself were at the
24 mediation with Mr. Benun. The process by which the mediation
25 was conducted was with the approval of Mr. Greenberg and Fuji's

1 counsel, as well as Mr. Sirota. The agreement was that Mr.
2 Larner and I, with Mr. Benun on behalf of the company, would
3 attend the mediation, and see what was happening, and report
4 back to Mr. Sirota and Mr. Greenberg as the proceeding ensured
5 to find out whether their presence was necessary, if their
6 input was necessary, and I represent to you, and if you look at
7 their time sheets from April 1st, you will see that they were
8 informed and kept abreast of what was going on. Now, the
9 troubling intimation from Mr. Story's affidavit is that Mr.
10 Benun forwarded something. Your Honor, there was no, and I
11 underscore the word no, offer made by Imation at the mediation.
12 Zero dollars. So, this suggestion in this affidavit that Mr.
13 Benun demanded some high in the sky number that would be
14 necessary more than he would need to take out all the
15 creditors, I don't know where that came from, because Mr.
16 Larner and I, on behalf of Jazz Photo, we were the ones doing
17 the talking and Judge Politan made no demand. The reason we
18 made no demand was that no offer was made, and the mediation
19 ended in a very relatively short period of time. And there is
20 a statement on the record at one proceeding, by Judge Linares,
21 that the mediation was a colossal waste of time. So, again, I
22 do not want there to be any taint that Mr. Benun did anything
23 wrong with respect to trying to amicably resolve this case. We
24 were there, ready, able and willing, pursuant to the guidance
25 of Mr. Greenberg and Mr. Sirota, and remarkably the concurrence

1 of Fuji that we go there and see if we can do something. The
2 only money ever put up in this case, Your Honor, was a number
3 of years ago at a status conference, or settlement conference
4 with Judge Hedges, and if memory serves me it was through the
5 insurance company for roughly \$1 million. And everything you
6 know about this case, \$1 million offer was not something four
7 years ago, nor is it today, that is going to do anything with
8 respect to an amicable resolution of this case. So, again,
9 there have never, ever, ever been dollar one put up, except for
10 that one time. Never has Mr. Story or their local counsel
11 called me, my firm, Mr. Larner, or anybody else and said, we
12 are willing to put up some money to resolve this case. There
13 have been numerous letters by Mr. Story, all of which I have
14 here imploring him to allow you to somehow get involved in the
15 settlement process. Judge Winaris has never, ever once
16 responded to any of those inquiries. So, I was troubled by
17 that last evening. You may hear it in my voice, because I was
18 there. I was there through the guidance of this Court, and
19 with everybody in this court, and we did not walk away from
20 some offer. There was offer, and Judge Politan concluded the
21 proceeding.

22 So, we are anxious to try this case. It was not Mr.
23 Benun or Jazz' fault that the Speedy Trial Act pre-empted it.
24 Other than these in limine motions, trial briefs are in.
25 Everything is in. We were ready, as Mr. Story was, and wasn't

1 able to go. So, the hope is we get the January 10th, have the
2 in limine motions resolved, and start with, I think everyone
3 has always concurred, would be a five to six week trial. I'm
4 sorry, I show a little emotion for once.

5 THE COURT: That's all right. That's okay.

6 MR. FRAZZA: It was very troubling to read that
7 affidavit last evening, because that was not only implicating
8 Mr. Benun, but also myself.

9 THE COURT: All right. Thank you. Mr. Story?

10 MR. STORY: May I respond, Your Honor.

11 THE COURT: Yes. Just for the record, would you make
12 your appearance, please?

13 MR. STORY: Yes. Bill Story, Dorsey Whitney on
14 behalf of Imation.

15 THE COURT: I think you're going to have to come
16 forward. We won't be able to get you on the tape.

17 MR. STORY: Bill Story, Dorsey Whitney, on behalf of
18 Imation. May I respond very briefly? I won't go through all
19 of the aspects of the claims. If Your Honor is interested,
20 I'll be happy to. But let me talk mostly about the last --

21 THE COURT: Well, is Mr. Frazza correct that Count
22 Three, the breach of contract is, in fact, not dismissed?

23 MR. STORY: There is a dispute on that. We believe
24 there is no basis for any contract claim in this case. We had
25 ready and will -- to the Court that it was never pled as such.

1 Of course, summary judgment never addressed it, as plaintiff,
2 Jazz Photo, in their response never even talked about it. It
3 was only after their warranty claims were thrown out that
4 suddenly they try arguing, well, there's still a contract.
5 Look at the complaint. The only mention of contract is the
6 warranties that are in the contract. There's nothing other
7 than good faith, which, it did not exist in the complaint.
8 Moreover, as perhaps our records in our trial brief, under the
9 Hong Kong law, which the judge tells does apply, there is no --
10 that's why we put that in there.

11 Now, as to the last point, let me simply say this, I
12 was also at the mediation. I know what was said. Whether the
13 mediation -- whether the mediator conveyed our position to Jazz
14 Photo, I don't know. I do know that we discussed with the
15 mediator what Imation would be willing to pay. There were
16 numbers discussed. We also told the mediator that it our
17 suspicion, based on what happened that day, that Jazz Photo
18 would not accept anything less than what they had to get to get
19 out of bankruptcy, and that we would go nowhere near that
20 number because --

21 After a long discussion, googling with Jazz Photo and
22 it's representatives, the fact that we're right, this isn't --
23 proceeding, it's not going to happen. That's all I know. We
24 were told that. That's what we were told.

25 THE COURT: Well --

1 MR. STORY: To say that there was not one zero --

2 THE COURT: Well, okay. Let me just say this, with
3 all due respect to Judge Politan, here you are. You know,
4 today is as good a day as any day. You can communicate. I
5 don't know where that's going to go. Or you need not. That's
6 up to you. You got all the forces here, and so, if something
7 wasn't, in fact, communicated, it can today be communicated
8 without some intermediary.

9 MR. STORY: That would be fine. I would also point
10 out that a reference to the prior mediation, a number of years
11 ago, at that time, before Jazz Photo had had thrown out already
12 all its warranty claims, the 1999 fraud claims, the 1999
13 warranty claims, the fraud act claims, before all those were
14 thrown out, Imation's -- was granted summary judgment. At that
15 -- their demand was far, far less than the amount owed each
16 creditor, and if they're still in that range, I'd be happy to
17 talk to them.

18 THE COURT: Well, as I'm sure both of you experienced
19 people know, I think it's difficult to deal on the record with
20 old offers, old situations, changing situations as you approach
21 trial, and I'm not going to interfere or influence that
22 process, and I leave it to you, but I do appreciate your input,
23 and I appreciate Mr. Frazza's input. I do -- yes, Mr. Sirota?

24 MR. SIROTA: No, I'm sorry, Judge.

25 THE COURT: That's all right.

1 MR. SIROTA: Before we leave --

2 THE COURT: Oh, I'm not going to leave.

3 MR. SIROTA: -- the issue of Imation.

4 THE COURT: Yes. I wasn't going to leave that issue
5 either. I had some questions. But go ahead.

6 MR. SIROTA: It's one thing to say to the Court that
7 there is suspicion that Mr. Benun and this estate may not
8 settle for the full amount of the creditors. It's another
9 thing to say in an affidavit, in Section Seven, and I quote,
10 but to date Jazz Photo, through its representative, Jack Benun,
11 has been unwilling to resolve this matter for anything less
12 than the amount exceeding what it and he owes creditors.

13 THE COURT: Okay. But it doesn't -- you know, your
14 statement didn't say that's what we were told. It seemed as
15 though it was sort of a first party statement, but I don't
16 think -- we have a lot of disdain in this matter, and I don't
17 think it pays to go too deeply into that. But let me ask Mr.
18 Frazza first and, certainly, I can hear from you on it. Mr.
19 Frazza, what do you think the linkages, if any, between the
20 Federal Circuit review of Judge Hochberg's judgment and the
21 Imation case in terms of damages?

22 MR. FRAZZA: Zero. I don't think it's --

23 THE COURT: You think it's zero.

24 MR. FRAZZA: -- issue, which as I saw a footnote in
25 Mr. Story's affidavit, has anything to do with the measure of

1 damages. It is absolutely, positively irrelevant to the
2 damages, and we have expert reports that relates to damages,
3 and with all due respect, that is an issue that I don't even
4 believe, in the wake of all the in limine motions, that we have
5 in front of us, that it's something that Imation has moved on.
6 So, I don't think that there's any nexus or connection and it's
7 not really been ever addressed by Judge Linares. That's not to
8 say, Judge, that he might not raise it at some point in time.
9 But, heretofore, it has not been raised. There's no in limine
10 motion on it, and it was not something that I was considering,
11 although I did see Mr. Story's footnote.

12 THE COURT: Yes, as did I. So, is it your position
13 that if, for example, and who knows what will happen, but let's
14 just say that if the Federal Circuit affirms that the 56 cent
15 measure through that August, 2001 date will not have any impact
16 at all on the loss profit or other measure of damages for Jazz
17 if there should be a judgment for Jazz?

18 MR. FRAZZA: I think I can simply explain that
19 because I gave it some thought anticipating it might be raised
20 today. If Jazz has a claim against Imation, which is viable,
21 they would be entitled to that amount. What Imation is seeking
22 to do is offset the damages that it owes to Jazz, claiming that
23 the monies that Fuji is entitled to, they should get a credit
24 for. So, the way this would work, and why I don't think there
25 is any nexus, is that if we are successful in our claim, let's

1 say X dollars times three equals whatever, we would then need
2 to satisfy the judgment against Fuji. If the judgment, at that
3 juncture, would be 35-40 million, whatever the case might be,
4 and we satisfy that judgment, why should Imation get the
5 benefit of a 56 cent royalty that they allege is owed?

6 THE COURT: Well, I thought that the simple straight
7 line, and this could be wrong, but that Imation affected the
8 ability to sell the disposables, therefore, there weren't sales
9 of X units, and therefore, there was a loss profit of Y
10 dollars. To the extent that profit of Y dollars would be
11 impacted before August, 2001, by a 56 cent measure that would
12 go over to Fuji, but was not, because there weren't the sales
13 which would be the infringing sales of those units, that that
14 should affect the measure of damages. Mr. Story, is that your
15 position? That's how I read your footnote?

16 MR. STORY: Correct. These are not actual
17 statements.

18 THE COURT: Right. Exactly. So, there's --

19 MR. STORY: Hypothetical loss profits. The profiting
20 would not include that 56 cent -- and by their own expert, just
21 putting that in reduces the claim by almost 23 million.

22 MR. FRAZZA: I'd like Your Honor to look at the
23 damage report.

24 THE COURT: Go ahead.

25 MR. FRAZZA: The fallacy of that is that the damage

1 claims have multiple components. One is the Walmart recall,
2 and the damages that ensued there. After that, we did not use
3 the Imation film, and many of the cameras were deemed not to be
4 infringing. So, the 56 cents you could not owe if the cameras
5 in question were not deemed to be infringing. How could we owe
6 --

7 THE COURT: But if they were?

8 MR. FRAZZA: Well, that's unresolved at the moment,
9 as you know. The Federal Circuit is considering that issue. I
10 know we have Judge Hochberg's decision.

11 THE COURT: Yes, but my point is, and the
12 hypothetical was that the Federal Circuit just flatly affirms,
13 all right, and is there a linkage between what's before the
14 Federal Circuit and the damage measure in the Imation case?

15 MR. FRAZZA: I understand your position. I certainly
16 understood Mr. Story's position, but in the limited amount of
17 time I had to look at that since last evening, I do not think a
18 third party such as Imation can reap the benefits of allegedly
19 monies that Jazz owes to Fuji.

20 THE COURT: Well, if it's no longer alleged that
21 there would have been if there had been a sale, a 56 cent tax
22 for the infringement --

23 MR. FRAZZA: Yes. isn't it Jazz' obligation, you
24 know, to pay that?

25 THE COURT: Well, if there weren't a sale there'd be

1 no obligation. If your measure of damage on behalf of Jazz a
2 function of a sale that was lost, there was no sale, therefore,
3 there was no infringing sale that it seems that there's some
4 logic to the point that if there were a sale it would have been
5 infringing and would be subject to the pre-August 21, '01 tax,
6 if you will, which was assessed by the District Court, but I
7 won't go too far into that. My question is really linkage to
8 the Federal Circuit review, and that certainly was introduced
9 by Mr. Story, and I'm not -- you know, it's not for me to give
10 an opinion on that, as to whether it's right or wrong in terms
11 of the measure of damage, but at least as I hear it from
12 Imation's perspective that the infringement issue takes on,
13 yet, another dimension in the Imation case besides having a
14 relationship to the ongoing Chapter 11 and all the issues that
15 are before the Court today.

16 MR. KAPLAN: Your Honor, may I, having participated
17 in the District Court, add just one point?

18 THE COURT: Sure.

19 MR. KAPLAN: And I think you overlooked --

20 THE COURT: Mr. Kaplan, go ahead.

21 MR. KAPLAN: If the Federal Circuit affirms
22 everything in Judge Hochberg's opinion, one of the things that
23 will be affirmed is that a portion of the cameras was not
24 infringing because there was a non-infringing way to do it.

25 THE COURT: Right.

1 MR. KAPLAN: If the damages theory is that -- which I
2 don't know about the Imation case, but if, taking what you just
3 articulated, if the damages theory is that over all these prior
4 years there could have been more and more cameras sold by Jazz
5 had it not been for Imation's conduct, if that's the theory.
6 That's what I think I just heard you say, there's no evidence,
7 even if the Federal Circuit affirms anything, that everything
8 that those hypothetical additional cameras would have infringed
9 over the non-infringed. You can't assume that any royalty
10 would be owed on that, because you have to have a whole other
11 proceeding to prove if they would have been made and sold would
12 they have been made in the way the non-infringing ones were
13 found by Judge Hochberg, or the infringing ones were found --

14 THE COURT: And you don't think that a reasonable
15 District Court could simply take the same ratio that was used
16 by Judge Hochberg and apply it in the same period of time.
17 We're only talking about up through that period of time --

18 MR. KAPLAN: I don't think so --

19 THE COURT: -- the Imation damage issue?

20 MR. KAPLAN: I don't think so, Your Honor, because
21 the way the ratios would work, it would depend on which
22 factories would make which -- and you have to show that these
23 additional ones would have been made in the same factories, and
24 the same proportions. There's no way to figure that out --

25 THE COURT: Whose burden is it?

1 MR. KAPLAN: Whose burden is it? I'm not sure whose
2 burden it would be. I mean, it strikes me initially as saying
3 it should be Imation's burden to prove that that's entitled to
4 offset the damages, but the only point I'm making -- I don't
5 know that you're --

6 THE COURT: As opposed to a plaintiff's measure of
7 damage, which is to show net profit, and how net is derived?

8 MR. KAPLAN: Your Honor, the only point I'm making,
9 because I have no knowledge of the Imation case -- the only
10 point I'm making is the affirmation by the Federal Circuit does
11 not imply that any hypothetical additional cameras would have
12 been made in an infringing matter, and we can debate what
13 percentages or how to calculate that, or whether a proceeding
14 is -- but you, simply can't multiply 56 cents by the number of
15 cameras, because that clearly doesn't work.

16 THE COURT: But the ratio of non-infringing and
17 infringing could be brought forward to the same calculation,
18 and that 56 cents could be applied. Whether it should or
19 shouldn't I don't know, but what I'm trying to get to, and the
20 reason that I asked the question wasn't to establish or
21 undermine a measure of damage. It's simply to test the linkage
22 between and among these different arenas, here the Federal
23 Circuit is now tied, at least in Imation's view, to that case
24 in terms of measure of damage, and it's clearly what's been
25 said in the footnote, and whether it's correct or incorrect is

1 for another court to decide. Ms. Jurow, I note your presence.

2 MS. JUROW: Thank you, Your Honor. Margaret Jurow
3 for the United States Trustee. I'm sorry I was late.

4 THE COURT: That's all right. No, I note yesterday
5 you indicated that you might be here.

6 MR. FRAZZA: Your Honor, the point is --

7 THE COURT: Go ahead.

8 MR. FRAZZA: I'm sorry.

9 THE COURT: That's all right.

10 MR. FRAZZA: Mr. Sirota reminded me, there has been
11 no -- and this case has been lurking for close to six years
12 now, no tie together by Judge Linares or Judge Politan or
13 anybody else who handled this case. I understand the raising
14 of this at this late hour, but I do agree, respectfully, with
15 Mr. Kaplan, that on the hypothetical nature, because no one is
16 going to be able to know, forgetting about shifting burdens or
17 whose burden it is, the lion's share of the damages ensue after
18 the recall. The recall is a hard dollar number. We incurred
19 X. After that it is a loss profit analysis, and I don't know,
20 using an overused cliche, if you can have a case within a case
21 to establish that. The other side of that, as I said, was, I
22 think, from the research that I was able to do, that to the
23 extent that -- let me say it differently. If you were to
24 follow the deduction of the 56 cents, what is it that Jazz was
25 then owed to Fuji?

1 THE COURT: Nothing on that because there was no
2 sale.

3 MR. FRAZZA: But, the measure of damages would be
4 that there was a sale is what I'm following you, that's what --

5 THE COURT: If there were a sale, which generated a
6 profit --

7 MR. FRAZZA: Right.

8 THE COURT: Which is the event that is the starting
9 point for the measure of damages, we -- Jazz lost sales, but we
10 couldn't get the sale because of Imation's failure, it was
11 their default. Therefore, that sale was lost. If that sale
12 were not lost we would have had a profit of Y dollars against
13 an X sale price. But, if that had occurred, would be the
14 footnote import, which is, in that event, there would be the 56
15 cent tax. That's the logic of it. Now, it's either right,
16 wrong or indifferent, but I'm not -- as I say, it's not for me
17 to rule on, and I'll just leave it. But, we still have, yet,
18 another linkage.

19 MR. STORY: One last point, Your Honor?

20 THE COURT: Go ahead.

21 MR. STORY: This is not raised for the first time in
22 the footnote. This is our expert's report, out of detailed
23 depositions, reports. One of the things that we put in our
24 letter is that the damage claim here already has been cut by
25 over half by the first cut that has been by a motion in limine.

1 Constantly, somehow the damages realistically -- in the Jazz
2 Photo resignation case are at such an extent to prompt all of
3 the creditors to move here. From our perspective, we simply
4 think it's wrong, but we won't go to the argument -- what we
5 put in our letter -- from you or anyone else, to look at the
6 letter to his report. Look at these issues, because I -- and
7 any assessment of those is going to -- Fuji, that even if --

8 THE COURT: Thank you, gentlemen. I will ask another
9 question, which would be a bridge question, I would assume,
10 between you, Mr. Frazza and Mr. Sirota, about the impact of
11 conversion if it were to occur on the Imation litigation, and
12 we can get to that but, Mr. Sirota, you had something to say?

13 MR. SIROTA: Judge, I was about to introduce Mr.
14 Peterson, and leave the Imation area.

15 THE COURT: Well, okay. Maybe you want to think
16 about that and we can hear from Mr. Peterson, all right.

17 MR. PETERSON: Good morning, Your Honor. My name is
18 John Peterson. I'm an attorney with Neivel Peterson in New
19 York City. Our firm specializes in international trade.
20 Recently, we were pressed into action, on an emergency basis,
21 on behalf of Jazz Photo and Photo Recycling Enterprises, a
22 company that supplies Jazz with recycled or used camera shells.

23 The circumstances are as follows: On August 31st,
24 Customs officials in the port of Los Angeles communicated to
25 Jazz a series of new requirements, which Customs had

1 established for people importing cameras -- disposable onetime
2 use cameras, which were claimed to have been processed abroad
3 through permissible repair. These requirements have been made
4 public before. They had not been articulated by the United
5 States International Trade Commission, and in several cases
6 they simply were -- for example, the requirements have said
7 that every camera shell exported from the United States was to
8 be marked with an individual and unique serial number, and the
9 serial number was to remain with the camera upon its return to
10 the United States. Apart from being, perhaps, physically
11 impossible, and incredibly expensive, that was something that,
12 obviously, nobody had done, since nobody had articulated that
13 requirement. We contacted Customs, and also the Court in Los
14 Angeles and Customs headquarters and both of them that this new
15 requirement that they had imposed was a substantive legal rule
16 that could not be done -- comment rule making under the
17 Administrative Procedure Act. There was a couple of days worth
18 of discussions with Customs, at the conclusion of which we were
19 informed these requirements were not being withdrawn, and we
20 were also informed by the Customs of Los Angeles that the
21 agency has suspended the normal process of policing cameras
22 claimed to be permissibly repaired.

23 At that point, on September 9th, we filed a lawsuit
24 in the United States Court of International Trade in New York,
25 and we asked the Court to set aside these new requirements,

1 primarily on the ground that there were legislative rules that
2 had not been promulgated in accordance with the requirements of
3 the Administrative Procedure Act. We asked the Court to enter
4 an injunction against the enforcement of these rules. We
5 brought that motion on by a show cause motion so that we could
6 get an expedited hearing. But the case was assigned to Judge
7 Timothy Stanceu, and during this past week we have had a number
8 of discussions with Judge Stanceu over various aspects of the
9 issues. During the case proceedings, Judge Stanceu made a
10 couple of points clear. First, he considered these
11 requirements to be substantive rules. Secondly, he considered
12 that the government needed to comply with the Administrative
13 Procedure Act, and had not. He recognized that the government
14 was obligated to keep out -- cameras under the exclusion order,
15 but that the government has an equal obligation to allow the
16 importation of permissible repaired cameras, without -- the
17 government is not free to impose any external standards from
18 the prudent permissible repair that were required. But,
19 instead, Jazz', as an importer, is required to prove on an
20 entry by entry basis that its cameras are admissible.

21 Now, yesterday morning the Department of Justice made
22 a submission to the Court of International Trade advising that
23 it was going to withdraw these new requirements. These
24 requirements, we learned yesterday, were part of a proceeding
25 started on August 4th, 2004, by Customs called "Operation

1 Snapshot." That was designed to intensify the enforcement of
2 the Section 347 exclusion order. In the case of these
3 particular requirements, Judge Stanceu indicated, and I believe
4 that the government has now agreed that Customs went too far.
5 Also, yesterday, Customs provided the Court with a copy of its
6 construction and sealed offices with -- these new requirements.

7 Now, this, of course, doesn't mean that Jazz or
8 anybody else has cart blanche to import permissible repaired
9 cameras. What it does mean is that Jazz has the obligation to
10 prove to the satisfaction of Customs, on an entry by entry
11 basis, that, in fact, the cameras are permissibly repaired, and
12 that the cameras are, in fact, the subject of a pass -- first
13 sale in the United States, and that's really the only relief
14 that we asked for. Obviously, we could not be held to some
15 standard behavior such as serial memory that hadn't been
16 communicated previously.

17 So, as of today, our understanding is that Customs
18 has communicated its restoration of these rules to the courts,
19 that the courts are now free to resume the regular processing
20 of entry of permissibly repaired cameras, that they ought to
21 contact us with proof of admissibility on an entry by entry
22 basis.

23 The notice only went out yesterday. I understand
24 that Mr. Burkhard, who handles the logistics for Jazz has been
25 in touch with Customs in the port of Los Angeles.

1 THE COURT: So, if Mr. Burkhard goes to Customs to
2 make his proofs on container load 15 that comes in, what is he
3 going to show?

4 MR. PETERSON: Well, he can show anything Customs
5 will accept.

6 THE COURT: And is it a blank as to what he's going
7 to show? We don't know yet? And what Customs is going to
8 accept?

9 MR. PETERSON: Well, the parties are going to have to
10 have dialogue on that. I can't, personally, join the dialogue
11 until the stipulation of dismissal is entered in this case,
12 which hopefully will be today, because I can't have any ex
13 parte communication with the opposing -- you know, with the
14 adversary on behalf -- but the government has urged me to get
15 involved in process, and I assume --

16 THE COURT: Let's assume for argument sake that
17 Customs says, I don't accept your proofs. What happens? They
18 keep the container out?

19 MR. PETERSON: Well, if they keep the container out
20 --

21 THE COURT: Go back to the Court of International
22 Commerce?

23 MR. PETERSON: Yes. The -- if Customs excludes the
24 container, Jazz is permitted to protest that decision and
25 submit proof of admissibility. If the decision is -- if the

1 protest is denied then the case would go back to the Court of
2 International Trade, where we determined whether that
3 particular entry was admissible, and then in that case the
4 Court might do a trial on the question of infringement which,
5 of course, wasn't involved in this proceeding that we brought
6 last week. It was really just a question of administrative
7 procedure.

8 However, as was pointed out to Customs, Jazz does
9 track the shells that it collects to ensure that they're all
10 from the United States. Since the ITC's determination in the
11 enforcement case, Jazz only prepares, I am advised, cameras
12 that are in their original packaging, bearing the trademark of
13 Fuji or one of the licensees. So, we've eliminated the so-
14 called -- problem.

15 The only other problem that the ITC had with the
16 proceedings that were going on, I understand, is that for some
17 cameras there was an operation where Jazz replaced the whole
18 back of the camera instead of half of the back of the camera.
19 Jazz, I am told, presumably stopped that whole back
20 replacement. The ITC did identify in the face of Polytech
21 Enterprises, which I understand is now Jazz' only contractor, a
22 19 step process of permissible repair. So, basically, the ITC
23 has given a blueprint for Jazz to follow on how to do
24 permissible repair. There were two things that Jazz or that
25 the ITC found the Jazz Group is doing that it disagreed with.

1 Jazz has appealed that decision with the Federal Circuit, but
2 in the interim, they've obviously stopped the two things which
3 the ITC found objectionable, which were reloading cameras
4 already repaired, and doing this fullback replacement
5 operation. So, if asked by --

6 THE COURT: But didn't the ITC, through the
7 administrative law judge, simply scrap the control system that
8 Jazz had in place, saying that it's imperfect if not in chaos?

9 MR. PETERSON: Well, I think he said it was not
10 consistently applied, but what Judge Stanceu indicated was that
11 for purposes of current imports it's going to be Jazz'
12 obligation on a case by case basis to show that on the case of
13 repaired cameras they can trace the cameras collected in the
14 United States.

15 THE COURT: And this last fact that you've added that
16 no shell out of its original case or packaging is being
17 utilized for reloading purposes. Where does that come from?
18 You were told that?

19 MR. PETERSON: That was communicate to me by Mr.
20 Benun, and it was discussed after the ITC order on the reload.
21 What I understand to be happening is that Jazz is now repairing
22 cameras in the original package. When it does repair a camera
23 that was in its original package, the place is sort of marked,
24 with not a serial number, but some sort of markup camera, so
25 that should that camera come back again, Jazz would know that,

1 you know, that was a camera that they did, in fact, repair out
2 of its original packaging. I don't know all the details about
3 how that works. I'm sure there are other people at Jazz that
4 can explain the details more clearly than I. But as far as --

5 THE COURT: But you're being told that every reloaded
6 shell is presented to Jazz or to its single source in an
7 identifiable package, is that what you're being told?

8 MR. PETERSON: Well, when I say a package, I mean in
9 its original wrapping, you know, bearing Fuji or a Kodak
10 trademark or whatever, as opposed to something that might bear
11 the Jazz trademark --

12 THE COURT: Well, how does that work? You know, I go
13 into Walmart and I buy a disposable, right, and it's in a
14 package. Now I use it, and I, what, send it to a processor,
15 well how is the original package?

16 MR. PETERSON: Well, I mean, the retail package in
17 which it comes is, obviously, discarded by the user.

18 THE COURT: So, which package are we talking about?

19 MR. PETERSON: I'm talking, for example, about the
20 stickers or the markings that appear on the camera itself.
21 These cameras, typically, have logos on the body of the camera,
22 you know, that could say Fuji or Kodak, you know, that's my
23 understanding of the process. There may be other folks from
24 Jazz who can explain how it works in more detail. But, a
25 protocol has been added to a sorting process for shells

1 overseas.

2 But, in any event, what we have to prove to Customs,
3 and which we've always had to prove to Customs, and thus, to
4 Customs' satisfaction, is that on an entry by entry basis,
5 every camera we offer is admissible, and we have --

6 THE COURT: But we have no experience, yet, with
7 that?

8 MR. PETERSON: Customs has made inquiries and has
9 done some intensive examinations of prior imports since the ITC
10 decision. I don't know in what detail they went. During the
11 Court case in the Court of International Trade, we offered to
12 the government, and we said, and it's a standing offer. We
13 made the offer on the record. It's not incorporated in the
14 government's -- but we made the offer on the record that, at
15 any time, for any number of occasions it wants to do it,
16 Customs and the board of protection can come, announced or
17 unannounced, to the premises of Jazz, to the premises of Photo
18 Recycling Enterprises, to the premises of Polytech. They may
19 observe the operations. They may observe every record. So, we
20 made that offer. And, in the past we have provided video
21 records of repair operations. We didn't go over to Hong Kong
22 about a year or two ago with Customs because of the Sars scare
23 at that time. But, the offer has been made, and it's been made
24 on the record, and to prove it, you know, Customs may go to
25 Polytech at any time they want. They may go to Jazz or Photo

1 Recycling Enterprises, and I can ensure that if they find that
2 there's a defect in the current procedure they'll exclude the
3 cameras.

4 THE COURT: Okay. And I would guess your, in part,
5 giving me a status, and I appreciate it. In part, providing me
6 with information that could lead to a conclusion that Jazz is
7 either currently infringing on a continuing basis or otherwise,
8 and may be what Customs decides would be relevant to that in
9 one way, shape or form --

10 MR. PETERSON: Well, Customs --

11 THE COURT: Customs says no, these are no good, they
12 can't come in, what do I do with that information?

13 MR. PETERSON: Well, I think Customs says it doesn't
14 come in, as I mentioned before, their decision would be
15 reviewable by the Court of International Trade in a protest
16 proceeding.

17 THE COURT: But until it's done, what do I do with
18 that fact, if it were a fact? Do, I consider it? Do I say,
19 hmm, they might still be infringing, just as the opposite, if
20 questioned -- I'm sure if Customs said, that's squeaky clean,
21 it can come in, you would be up here saying, look, the process
22 is good and there's no current infringement, am I right?

23 MR. PETERSON: Well, whether that constitutes proof
24 in another forum I can't say. All I can say --

25 THE COURT: No, it would relate to what I'm doing.

1 Obviously, one of the questions before me, and we get back to
2 the enabling term, are we still involved with an ongoing
3 infringement where this Chapter 11 proceeding is being utilized
4 to give a free license to Jazz on Fuji's patents?

5 MR. PETERSON: I don't believe so, Your Honor. I
6 mean, the ITC did not find all that the prior cameras be
7 infringing, and as Jazz has gone through the permissible repair
8 proceeding, you know, various courts and administrative bodies
9 is moving along sort of changes the rules a little bit, or
10 expressed different views on what is or isn't permissible
11 repair, or is or isn't proof of first -- and Jazz has had to
12 adapt itself, you know, and hopefully improve its process.
13 Now, in the case of Section 337, Customs was the agency that
14 does the initial enforcement, subject to the review from the
15 Court of International Trade. There's currently a bit of an
16 issue with 337 where, in some cases, Customs has had cameras
17 that are admissible, the ITC has imposed penalties for the
18 admission of the same cameras.

19 THE COURT: But let me just press this one point. If
20 you negotiate -- Jazz negotiates with Customs next week, and
21 that container load is allowed in, I assume that someone on
22 this side is going to say, look, Customs found it to be
23 compliant and non-infringing. That should influence you,
24 Judge, because there's not a continuing infringement.

25 MR. PETERSON: I would say so, Your Honor. But it's

1 also -- it's not a negotiation of Customs, it's a question of
2 giving them proof. We don't negotiate the admissibility --

3 THE COURT: Okay. Fair enough.

4 MR. PETERSON: -- we prove it.

5 THE COURT: All right. I'll use a different term.

6 All right. I hear you and I appreciate what you're saying.

7 Thank you.

8 MR. SIROTA: Judge, isn't the point with Customs, and
9 I think I understand Your Honor's question, we're living with
10 their determination. Relief from the stay was granted. We're
11 in the process -- the ITC process, and Customs now tells us
12 whether it comes in or it doesn't come in. Our point exactly,
13 in not having yet another court tell us whether there's
14 infringement. If Customs says the product is excluded, and Mr.
15 Peterson, through every legitimate Customs or International
16 Court of Trade can't let the product in, then we have a very
17 serious problem.

18 THE COURT: Yes. And that was the two sides of it
19 that I had asked. I appreciate that.

20 MR. SIROTA: We're not asking permission here, or
21 another court to review what Customs --

22 THE COURT: I understand that, and that's why I
23 asked.

24 MR. PETERSON: But there is -- to elaborate on what
25 Mr. Sirota said, I mean, Section 337 is enforced by Customs,

1 but there is a judicial review mechanism in the Court of
2 International Trade, and ultimately back at the Federal Circuit
3 for those decisions. So, Section 337 --

4 THE COURT: But, Mr. Peterson, let me speak through
5 you to Mr. Sirota, because although I'm perfectly willing to
6 hear, and try to absorb the Customs' issues, as I am the
7 infringement issues through you, I can see et cetera, for this
8 Court to question is always, should this Chapter 11 continue
9 if, for example, there's a negative result insofar as Jazz is
10 concerned with Customs, and Customs says, no way, they stay
11 out, and then you say, well, of course, it's reviewable by the
12 International Court of Trade, well how long, how much, and when
13 does that all work it's way out? Just as the Federal Circuit
14 issue from the ITC ruling or when it becomes final, the most
15 recent EID-II, as it goes through the ITC and comes out the
16 other end, how long will that take, and what does this Court do
17 with all of this long-term litigation, we could ask the same
18 question about Imation, and the end result there, and the
19 appeal process that comes out of that, and that's what I will
20 ultimately ask Mr. Sirota.

21 MR. PETERSON: If I could help with that. The only
22 -- as far as Customs is concerned, if Customs keeps stuff out,
23 keeps product out, and their decision is protested, and a
24 judicial review is sought, the first thing to bear in mind is
25 that this will be what we call an exclusion case, and

1 merchandise will sit on the dock and it won't be admitted into
2 the United States. So, as to any merchandise we try that issue
3 on, there's no possibility of harm to Fuji or anybody else
4 because the goods aren't moving, they're not getting in.

5 Secondly, because it is an exclusion case, the Court
6 of International Trade will provide that the case must be heard
7 on an expedited basis. So, if that issue comes to the point
8 where it needs to be tried, it would not be a very long process
9 in my opinion.

10 THE COURT: Okay. All right. I do appreciate that.
11 Thank you.

12 MR. ROSENTHAL: Your Honor, can I address a couple of
13 the points that I've been listening very --

14 THE COURT: All right. I think it is fair to, you
15 know, to keep you bottled up and have this side discuss --

16 MR. ROSENTHAL: All right. Then I --

17 THE COURT: No, no. I'll hear you. I'm saying, it
18 is fair to hear you. No, I'll hear you, briefly. You heard
19 Mr. Sirota make his point, and he's made it in papers, and I'm
20 sure will make it again, that the process that has been
21 undertaken consensually through the ITC and Customs is a
22 process that he's willing to stay with and that the application
23 today, which is one of the many application pending, to bring
24 an action before the District Court is out of the straight line
25 of that agreed to program.

1 MR. ROSENTHAL: Your Honor, let me start with
2 observation. When this case started in May of 2003, Fuji's
3 patents had approximately four years of life. They now have
4 two and a half or less. What we have here is a wasting asset,
5 and if I listen to -- if I understand what I am being told, we
6 should wait until the patents expire before this Court takes
7 action because we should wait for the CIT, we should wait for
8 the Federal Circuit, and this proceeding and that proceeding.
9 But, I can't escape from one basic fact. Mr. Benun has put a
10 declaration in, in the CIT. And I was not permitted to
11 participate in that proceeding. My application to intervene
12 has been -- not been acted upon. It now probably becomes moot
13 with this stipulation. I've been accused by Mr. Sirota of
14 wrongly putting in confidential business information into the
15 CIT in his last pleading. I will observe that I believe firmly
16 that they were properly given to the Court. It's responsible
17 for reviewing ITC decisions in the same way that the Federal
18 Circuit gets in. Neither are mentioned in the statute. But,
19 unfortunately the ITC never heard of this question before, and
20 no one has an answer, and it may take the commission a year to
21 decide whether the papers should or shouldn't go to the CIT,
22 but it's moot. But, let -- one of the many first impressions
23 we get in this saga.

24 But, I can't get past Mr. Benun's affirmation. When
25 I read Mr. Benun's affirmation, what he is saying clearly is,

1 that although I heard the ALJ on April 7th tell me that my ICP
2 program was insufficient, it was chaotic, but more than that it
3 was worthless, and why was it worthless? It was worthless for
4 many reasons. The chaos contributed. The reloaded reload
5 issue contributed. But, most important, it measured the wrong
6 thing. It measured whether or not the cameras were purchased
7 in the United States, not -- the shells were purchased in the
8 United States, not whether or not the cameras from which the
9 shells were taken were first sold in the United States, and
10 that's what the Federal Circuit told us in 2001 was the test.

11 But then I go to Mr. Benun's affirmation and I
12 discover that the only things he changed, that he's still
13 relying on the MON/SLN system, the only things he's changed is
14 I have a system now to detect reloaded reloads, and I'll use
15 them if they were reloaded reloads of Fuji or Kodak original
16 cameras, for whatever that's worth. But it doesn't address the
17 finding of the ALJ adopted now, with finality, by the ITC, that
18 the ICP system just doesn't work. And here we are four months
19 later, or three and a half months later, and what do we have?
20 We have three and a half million cameras -- shells, most of
21 them exported from the United States after the ALJ tells us
22 what to do, and they're treated like nothing ever happened in
23 the ITC. They're being offered with the same body of evidence
24 that they were offered before, and --

25 THE COURT: Well, we just heard a change, that's why

1 I asked --

2 MR. ROSENTHAL: Well, it's changed though if you read
3 the affidavit -- declaration -- affirmation --

4 THE COURT: Which I have --

5 MR. ROSENTHAL: -- carefully. What the change is, is
6 only to address the reloaded reloads issue, as if that were the
7 only problem with the ICP system. What the Judge --

8 THE COURT: Well, that's what Mr. Kaplan says in his
9 certification.

10 MR. ROSENTHAL: Well, Mr. Kaplan --

11 THE COURT: Besides the Kodak full half back issue.

12 MR. ROSENTHAL: Right. Well --

13 THE COURT: Mr. Kaplan says that that's -- it's only
14 the reloaded reloads that's at issue.

15 MR. ROSENTHAL: Well, with all due respect, Your
16 Honor, I have read the decision of the ALJ. I have lived this
17 trial. I was there at the trial. So, was Mr. Kaplan. I was
18 sort of surprised --

19 THE COURT: So, let me ask Mr. Kaplan this, if I may,
20 and, Mr. Kaplan, you have identified, in your certification,
21 the reloaded reload issue. You disagree with the half
22 back/full back Kodak issue, but you say it doesn't matter
23 because it's easy enough to go to the half back issue, and not
24 the full back, so that's out of the mix, and since Polytech's
25 processing is okay, and we'll deal with the reloaded reload

1 issue -- if we deal with that appropriately going forward, we
2 can't possibly step on a crack and be infringing through
3 Polytech. Is that a fair capsule of what you're saying?

4 MR. KAPLAN: Your Honor, basically, but let me give a
5 little background. I think you need a little background based
6 on your question as to Mr. Peterson. I'll try to be brief, but
7 it's a long case. Mr. Rosenthal said one thing that I,
8 basically, agree with, and that is the tests. What happened
9 was, Jazz started collecting all its shells from the U.S. The
10 problem with that system is that when you're collecting them
11 from the U.S., if you're collecting a Jazz camera that's
12 already been reloaded, say, a year ago, it may have been
13 something --

14 THE COURT: Exactly. It's a reloaded reload issue.
15 I understand.

16 MR. KAPLAN: Now, I want to emphasize, Your Honor, we
17 believe that's okay. Why do we believe that's okay, because
18 the issue of patent exhaustion --

19 THE COURT: With due respect --

20 MR. KAPLAN: Your Honor --

21 THE COURT: I understand there's a dispute there, but
22 so far the ITC disagrees.

23 MR. KAPLAN: The point is this, Your Honor, if you
24 start collecting your cameras from the United States, and you
25 only collect cameras from the United States with the original

1 wrapper, and to elaborate on what you said, the ALJ made a
2 finding -- it's in his I.D. that, I think, 90-95 percent -- I
3 forget the exact number, but almost all of the cameras have
4 that original packaging on. Not the outer packaging, but when
5 you bring it in to get developed, they crack it open and take
6 the film out of the actual wrapper that's stuck to the camera
7 is on there. You know if it's Kodak or Fuji. That's in the
8 ALJ's I.D. So, if you look at that packaging, and it's an
9 original Kodak camera that you collected from, you know, Eckert
10 Drugs down the street from here, then it was collected in
11 Newark, New Jersey, and it was developed in Newark, New Jersey,
12 and it's an original new camera by Kodak, the only possible way
13 that that wasn't first sold in the United States is somehow if
14 a tourist brought it in, and maybe that's one --

15 THE COURT: You made that point much, much earlier.

16 But let's just --

17 MR. KAPLAN: And those cameras are exempt --

18 THE COURT: But let me just ask this about the
19 original packaging. That was not part of your argument before
20 the ALJ?

21 MR. KAPLAN: Because they weren't doing that. Those
22 facts --

23 THE COURT: I understand. So, this is a change in
24 the program?

25 MR. KAPLAN: Absolutely. This is what --

1 THE COURT: Post ALJ April or July, depending on
2 which date you use.

3 MR. KAPLAN: They changed the test. Mr. Rosenthal
4 said something that's correct. Now the test is no longer just
5 collected in the U.S., which --

6 THE COURT: Let me just get to my \$64 question, if I
7 may. I understand, believe it or not. And maybe you don't,
8 and I would understand you're not believing it, but I have
9 gotten down to this three line excerpt, Page 35, of --

10 MR. KAPLAN: Could I just get a copy of what I've
11 sent in if you're going to question -- I'm sorry, I thought you
12 were going to question --

13 THE COURT: No, no. No. I wasn't going to ask you
14 about something you wrote. I'm going to ask about something
15 that the administrative law judge wrote in the EID-II, as we
16 call it. And it's simply this, "Hence, the administrative law
17 judge finds, assuming Jazz was able to ensure that the shells
18 of it's LFFP's in issue were strictly from domestic sources,
19 through it's ICP, that this would not ensure that said shells
20 were first sold in the United States." That's the source, I
21 assume, Mr. Rosenthal, of your statement that it's apples and
22 oranges. The fact that the sources U.S. does not translate it
23 to first sale anyway.

24 MR. KAPLAN: Your Honor, that's absolutely correct,
25 and there's several problems. There's the reloaded reload.

1 There's the problem that it could be they sourced it from a
2 retailer --

3 THE COURT: Look, there's a problem with the blue
4 Fuji that was never sold. You know, maybe that's a singular
5 incident that was picked out of a videotape, but you've got
6 page after page preceding this conclusion by the administrative
7 law judge --

8 MR. KAPLAN: Right.

9 THE COURT: -- saying that the ICP isn't worth a
10 darn.

11 MR. KAPLAN: Correct, Your Honor, and what I'm
12 telling you is that, I think, if you reason it for the logic,
13 what you'll see is that when you read the page after page, what
14 you'll see is that by making sure it's an original --

15 THE COURT: So, now you've got it, that's your point?

16 MR. KAPLAN: Well, I would ask Mr. Rosenthal, what
17 else would we have to do to prove that. He would tell you it's
18 impossible so that the --

19 THE COURT: Okay. But now you're on the right track?

20 MR. KAPLAN: Your Honor, I believe -- I mean, I've --

21 THE COURT: You believe that all along it was
22 correct, and those are issues for appeal, but putting aside
23 issues for appeal, now you have the roadmap, now you can
24 comply. You can comply and convince, through proofs, Customs
25 should allow the container load in, and this Court is not

1 enabling because you're finally, finally, after having good
2 definition come out of the regulators, able to develop a
3 roadmap that's perfect and there's not going to be any further
4 infringing. You don't agree that there was prior infringing,
5 but that's a matter for appeal, and so, everything is sweetness
6 and light now.

7 MR. KAPLAN: Well, Your Honor, I would answer that
8 question, with all respect, forgive me, with another question.
9 And I'll ask this sort of rhetorically. I know I'm not allowed
10 to question the Court.

11 THE COURT: Go ahead.

12 MR. KAPLAN: If Jazz is going around or, more
13 accurately, the company that collects the shells, and they're
14 collecting on the original packaging once that I'm -- and I
15 know --

16 THE COURT: You're onto the packaging.

17 MR. KAPLAN: Excuse me?

18 THE COURT: You're onto the new process?

19 MR. KAPLAN: Right. What I'm saying -- I thought
20 that's what you're asking?

21 THE COURT: No, what I asked was -- I just want to
22 make sure that the thesis today is that the process today,
23 which has changed, since the EID-II, is now squeaky clean in
24 every quarter, Customs, ITC, et cetera.

25 MR. KAPLAN: Well, the process -- let me --

1 THE COURT: I'm talking -- when I say process, I'm
2 not just talking about eight steps or 19 steps. I'm talking
3 about first sale as well.

4 MR. KAPLAN: Okay. Well, let me break into two
5 pieces, the process of the steps and the first sale. The step
6 process -- Polytech's process was approved in that same EID.
7 The judge found that their stuff, as long as they used the
8 halfback instead of the fullback is not infringing, and Fuji --

9 THE COURT: Mr. Rosenthal, do you agree with that?

10 MR. ROSENTHAL: No, Your Honor. The ALJ found that
11 the approximately 15 percent of what Polytech produced was
12 okay, if you will, and that consisted of Kodak shells
13 refurbished using a halfback, but it made no finding about the
14 -- that we saw when we were there. In fact, I mean, it found
15 them to be infringing. It made no finding about a host of
16 products, obviously --

17 THE COURT: It is a problem with the finding, because
18 the way the finding worked by taking the factors 60 percent of
19 11 million, times 55 percent, times 55 percent, times 50
20 percent, if I remember the calculus correctly, it gets you down
21 to 900 and whatever -- 98,000 units in 2003, and I think that's
22 where it sort of nets down, which were not infringing.

23 MR. KAPLAN: The point I'm trying to make --

24 THE COURT: But that is not the same as saying that
25 Polytech, otherwise, is completely compliant, which is what

1 you're saying.

2 MR. KAPLAN: Your Honor --

3 THE COURT: Am I right or am I wrong?

4 MR. KAPLAN: I think you're right, but I'm still not
5 getting the argument I'm trying to make.

6 THE COURT: Go ahead. I'm sorry. Go ahead.

7 MR. KAPLAN: I'm trying to say, Your Honor, is that
8 regardless of what the numbers are or were, we have a finding
9 that Polytech has a non-infringing process, meaning the way you
10 put the camera together. The reason I started my --

11 THE COURT: But, Mr. Kaplan, everyone has the
12 potential for that process. Everyone can do it right.

13 MR. KAPLAN: Correct.

14 THE COURT: Okay? Have they done it right in the
15 past? Authorities say no, you say yes. Are they doing it
16 right from this moment on so that this Court has a level of
17 comfort? You say yes. Mr. Rosenthal doubts it.

18 MR. KAPLAN: Well, we say let Customs go find out
19 right now. Well, that's what we say, not yes.

20 THE COURT: Okay. And let me hear an answer to that
21 from Mr. Rosenthal.

22 MR. ROSENTHAL: Your Honor, actually, Mr. Benun's
23 affirmation has more information that bears on this issue. Not
24 only does he say he's relying on the ICT program, but in
25 Paragraph 11, in describing his economic losses from the

1 conduct of Customs, he recites that Jazz will suffer \$1.75
2 million for monies paid to acquire the shells. That's the
3 story we've been hearing until now, and 6.3 million in amounts
4 paid to foreign processors to repair these cameras, including
5 labor and materials, such as film, batteries, flash units. I
6 have testimony from Mr. Benun in the ITC, elicited by Mr.
7 Kaplan that we never changed the flash units. We never do
8 anything like that. A horrific, terrible thought. But why
9 does --

10 THE COURT: So, you think that it's still a changing
11 landscape, and it will keep changing, and you'll keep
12 challenging, and they'll keep defending, and it either will or
13 won't comply?

14 MR. ROSENTHAL: Well, Your Honor, I don't think you
15 can be a little bit infringing, just as you can't be a little
16 bit pregnant. The issue is that they're never going to be
17 infringement free, because they choose not to, because it's
18 more profitable not to be infringement free, and --

19 THE COURT: All right. But, at least, for this
20 Court, again, and it's unfair, I think, of me, but I have to do
21 it, I have to bring this dispute, which has many faces to a
22 Bankruptcy Court issue, and it's an administrative issue, how
23 do I deal with the disdain here in a technical area, and what
24 weight do I give to authorities who say there was infringement
25 and how do I deal with a debtor who says, all right, I disagree

1 with that and we'll deal with that in appeals, but today, we
2 will meet everything that EID-II requires of us, and going
3 forward we won't infringe, and then I have, of course, Fuji
4 saying, there's already an indication that they will infringe,
5 and I have to do something with these facts, either disregard
6 them, put weight on them, decide them one way or the other --

7 MR. SIROTA: Your Honor, we do agree, Mr. Rosenthal
8 and I, I think, on one thing, and that is the following, and I
9 quote: Your Honor, the findings of the ITC are not binding on
10 this Court. The cases say that since the ITC is an
11 administrative body, its findings are not entitled to res
12 judicata or collateral estoppel effect, October 21st, 2003,
13 grant script Page 58, Line 20 through Page 59, Line 5. Your
14 Honor, we do agree, and the cases bear us out -- Mr. Rosenthal,
15 of course, that the findings of this administrative body do not
16 translate, respectfully, to put the debtor's lights out. What
17 they translate to is the issue that Your Honor asked me at the
18 last stay hearing, and Your Honor asked probably the most
19 important question then and the one today, and that is, when?
20 When does the cycle of litigation stop in the context of this
21 ongoing dispute.

22 THE COURT: I'm going to ask it again in very
23 specific terms today.

24 MR. SIROTA: And I've given it a lot of thought, and
25 when Your Honor is prepared to ask it, I'm prepared to answer

1 it right now.

2 THE COURT: So, gentlemen, just please sit down, and
3 I'll give -- Mr. Sirota, I just want to ask you this question,
4 which comes off of your quote of Mr. Rosenthal, and it's this,
5 if today we were to try to strip away uncertainty, which is a
6 function of total disagreement, and make a bit of a
7 hypothetical so that I understand the administration issue,
8 suppose today, Mr. Sirota, that I have before me and ITC
9 conclusion, and I know this is an EID from the administrative
10 law judge, but we had a substantive finding from the ITC, and I
11 know we're going to hear that the refusal to review is the
12 equivalent of that, and it said, in such clear terms, that up
13 until a date in 2004, Jazz had infringed for these reasons, and
14 had not repaired, and Mr. Kaplan couldn't muster, you know, the
15 many arguments and passion for his arguments that he has
16 mustered today -- if we concluded today that there had been
17 infringement, okay, in the administration period, but that now
18 you have a roadmap and you can go on and not infringe, should I
19 convert this case based upon infringement during the
20 administration period, and what would clearly be, however
21 measured, a five million, ten million, \$13 million
22 administration claim? Should I convert because of that?

23 MR. SIROTA: No.

24 THE COURT: Why?

25 MR. SIROTA: Because you would be giving to Fuji more

1 than they would get if we weren't before this Court. If we
2 weren't before this Court Fuji would be going down the ITC
3 process. They would be influencing Customs the way they're
4 doing, and they would be starting, perhaps, a second round of
5 litigation in the District Court had they not put on appeal the
6 exact issue they'd be going down the road with today. They
7 would not, and the ITC is not in the business of putting --

8 THE COURT: With all -- I hear you, but with great
9 respect -- and I appreciate what you're saying, but we're all
10 -- see, we're all stepping out of our realm and into -- you
11 know, we want to be experts all over the place, and it's
12 dangerous for me and for you. What I'm positing is up to a \$13
13 million administration claim, you know, without question. It's
14 hypothetical. Is that the end of the game for the bankruptcy?
15 Look, we've gone down the road. We've encountered a lot of
16 costs for litigation here, there and everywhere, and we have
17 had infringement in this administration period. Shouldn't that
18 kill off the debtor?

19 MR. SIROTA: I'm not convinced, Judge, that we have
20 infringement.

21 THE COURT: No, I'm saying --

22 MR. SIROTA: In your hypothetical --

23 THE COURT: Okay. Go ahead.

24 MR. SIROTA: If your hypothetical is Your Honor found
25 post-petition infringement, or the District Court, now --

1 THE COURT: So, I should arrogate to myself the --
2 not just looking at ITC's conclusion, but saying, you know,
3 maybe they're right. I don't agree with this line on Page 50
4 of their 100 page opinion, should I make that decision, or do I
5 defer, even if I'm not bound, do I say, look, people who know
6 better, who heard the whole proceeding, have decided that there
7 was infringement, what do I do with that?

8 MR. SIROTA: Those are --

9 THE COURT: During the administration period?

10 MR. SIROTA: Those are the same people that decided
11 prior that there was infringement. Those were the same people
12 that the Federal Circuit questioned --

13 THE COURT: So, I disregard --

14 MR. SIROTA: Judge, I'm not suggesting to you for a
15 moment that it's not relevant to decisions made by this Court,
16 but I am suggesting to you that it's not relevant to
17 conversion. It's very relevant to whether or not there's any
18 other thing that Fuji can do to pursue its rights.

19 THE COURT: Let me tie your hands, if I can. They're
20 right, hypothetically. Hypothetically, they're right. Even if
21 it's determined after the fact, the U.S. Supreme Court says,
22 they're right. Okay? Looking backward, should I have
23 converted?

24 MR. SIROTA: Judge, you can ask yourself that
25 question on every decision this Court makes every day. But,

1 Your Honor --

2 THE COURT: This is a case in which, the question is,
3 do we wait until -- it's the when question. Do we wait until
4 the last, last, last word is in? What standard does an
5 administrative -- does a bankruptcy judge use in looking at the
6 administration of this Chapter 11 and the purposes of Chapter
7 11, do I hear a tax on the ITC? Do I say, well, they were
8 reversed before, therefore, they can be reversed again, or do I
9 get into other issues, such as how long and what would it cost
10 to challenge ITC final conclusion once it comes out, and I
11 understand that it's not out? How much will it cost, and how
12 long will it take to Imation to actually be concluded, whatever
13 that is? What's happening with the debtor now? Is there a
14 change, which will give me comfort that no responsible ITC or
15 Customs agent will find that there is current infringement?
16 And when I sort of put that together now I'm more in the realm
17 of our usual discourse, and if I conclude, I guess, that, gee,
18 last time it took two years to get from the ITC to a Federal
19 Circuit decision. A little more than two years. It was, I
20 think, 26 months. And at what cost?

21 Now, I don't know if this one will take 26 months, or
22 12 months, or, you know, who knows. I mean, maybe we need to
23 have some input on it. What do I do with that? And I'll hear
24 you.

25 MR. SIROTA: And let me answer your question of when,

1 and I'll break it down into two parts. The first part is,
2 operationally, the impact upon this Chapter 11 debtor, clearly,
3 on the issue of conversion for the continuation of this Chapter
4 11 enterprise, the when goes to does Customs release the
5 product and allow this debtor to sell or not? That's the
6 agency that's responsible for the enforcement of the ITC
7 orders. That will govern very quickly and very definitely
8 whether this debtor can stay in business or not. If the
9 product is not released this debtor cannot sell. This debtor
10 is out of business. That's the when on the operational
11 conversion front. It's not waiting 26 months for a Federal
12 Circuit appeal of ITC too. The when on whether Fuji should go
13 forward, and expand and spread this litigation to the District
14 Court is when the Federal Circuit issues its opinion of Judge
15 Hochberg's decision, and that when and why is because that Fuji
16 has appealed a request for a future injunction, and I know they
17 say you're wrong, it's not the exact same relief, but I've read
18 that footnote in the March 13, 2003 judgment several times, and
19 the third point dealt with a request for future relief, which
20 Judge Hochberg said you can get before the ITC. It was argued
21 before the Federal Circuit on appeal and, frankly, Judge, the
22 injunction, even if Your Honor were to say go to the District
23 Court, that they seek is exactly or similar to what Customs is
24 doing practically, has Mr. Peterson described, by enforcing the
25 ITC's ruling, which goes to Your Honor's point, no future

1 infringement. The application to go to the District Court
2 isn't to put this company's lights out. That's clear. It's to
3 get an injunction to enjoin this company from future
4 infringement. They pared down the complaint, but that's what
5 they ask.

6 The conversion issue, putting this company's lights
7 out, based upon a non-binding decision of the ITC, which is
8 being enforced as we speak, so this Court is not enabling, to
9 determine whether our product should come in should run its
10 course.

11 THE COURT: Let me just -- and I appreciate what
12 you're saying, but you chose to go off onto the stay and
13 injunction issue. I'm not there. It's as unimportant today as
14 the administration claim issue. The important issue today, as
15 I see it, is whether the ITC decision, and I understand that
16 it's technically not final because the penalty stage is still
17 being decided -- we're still in that stage. If there was,
18 historically, an infringement during the administration period,
19 which generates a multi million dollar claim, should that
20 influence a bankruptcy judge, even if that conduct were
21 stopped? Because it's certainly going to be stopped if I
22 convert. This -- the conversion would include an immediate
23 requirement that a trustee appointed would not market these
24 disposables, and a company be liquidated, and so, you don't
25 have to get to stay issues and spreading litigation issues.

1 Should I give weight to a multi million dollar -- \$13 million
2 recommendation from the ALJ as to an administration claim, or
3 at least a fair part of it is an administration claim?

4 MR. SIROTA: Judge, in thinking about conversion you
5 certainly can't give weight to the administrative law judge's
6 claim of 13 million, when the ITC --

7 THE COURT: Move it forward to the ITC. Suppose the
8 ITC says 13 million.

9 MR. SIROTA: It's funny, Judge. The ITC has been
10 involved in this process for as long as Mr. Rosenthal, and as
11 long as Jazz, and according to the letter that I read from Ms.
12 Jurow, not one person from the ITC has expressed an interest
13 before this Court of putting this debtor out of business, or
14 setting a penalty.

15 THE COURT: With all due respect, they're not
16 involved in that process -- in the process of whether there
17 should be an conversion --

18 MR. SIROTA: But there --

19 THE COURT: -- any more than I'm involved currently
20 in deciding whether there was, historically, an infringement --

21 MR. SIROTA: But there --

22 THE COURT: -- or is now an infringement.

23 MR. SIROTA: But they're involved in the process of
24 fixing the penalty, and they way they fixed the penalty is not
25 to impose a penalty that puts even an infringer out of

1 business.

2 THE COURT: But with great respect, that's not -- I
3 understand -- it's a good argument. It's just not a home run,
4 and it's not a home run because, as you say, I should give
5 weight -- this isn't binding -- look, if I have spent 15 months
6 with a case, as all of you have, and if in that period up until
7 whatever, this summer, there was, in fact, infringement, which
8 generates a \$13 million claim post-petition, isn't that it?

9 MR. SIROTA: No. Not under the facts of this case
10 for the same reason --

11 THE COURT: What's the saving grace? Imation?

12 MR. SIROTA: The saving grace, Judge, is the same way
13 you may look back under your hypothetical and say, shouldn't I
14 have converted it. What a same it would be to look back and
15 say, the Federal Circuit made some changes, remand, vacated.
16 Imation hit, and this company is --

17 THE COURT: Two years from now the Federal Circuit
18 may change.

19 MR. SIROTA: Judge, I mean, we're -- no, no, not two
20 years from now --

21 THE COURT: You're talking about on the Hochberg
22 appeal?

23 MR. SIROTA: On the Hochberg appeal -- Judge Hochberg
24 appeal, that's was --

25 THE COURT: That's another when point.

1 MR. SIROTA: The saving grace, Judge, is the same way
2 you may look back under your hypothetical and say shouldn't I
3 have converted it. What a shame it would be to look back and
4 say the Federal Circuit made some changes, remand, vacated,
5 Imation hit, and this company --

6 THE COURT: Two years from now the Federal Circuit
7 may change.

8 MR. SIROTA: Judge, I mean we're -- no. No, not two
9 years from now on --

10 THE COURT: You're talking about on the Hochberg
11 appeal.

12 MR. SIROTA: On the Hochberg appeal -- Judge, the
13 Hochberg appeal, that was argued in May.

14 THE COURT: So that's another when point.

15 MR. SIROTA: I think that's a critical when point on
16 spreading the litigation. I know you're not there yet, but on
17 the conversion issue, Judge --

18 THE COURT: I think it's related to the conversion
19 very directly I think it's related to Imation. I think it's
20 related overall to -- but if there is a flat out affirmance
21 from the Federal Circuit, isn't that the death now for this
22 Chapter 11?

23 MR. SIROTA: It's the death now for Fuji's request to
24 go forward in another forum. I don't believe it's the death
25 now for the Chapter 11 in light of what we represented to this

1 Court day one, and that is the two-prong Imation and Federal
2 Circuit appeal. But, Judge --

3 THE COURT: So Imation can still save it is your
4 point.

5 MR. SIROTA: Imation -- I'm told by people who have
6 invested a lot of time and money that Imation can save it.

7 THE COURT: So there's always another day, and I'm
8 not saying that facetiously. Don't misunderstand me, but I am
9 saying that because of good lawyering on both sides -- and I
10 don't say that to slather anybody with praise. What I'm faced
11 with is the continuum. I don't think it's a healthy thing.
12 When you say how would I feel looking back if two years from
13 now this, that, or the other thing happened, well, I think I
14 have to decide now, and I have to decide, but the now is kind
15 of flexible. I have to decide before it takes two years to --
16 I'm going to assume for argument sake that \$13 million comes
17 from the ITC on EID-2, and that's a long road to uncork.

18 MR. SIROTA: Agreed.

19 THE COURT: Can't wait for that. I mean as a
20 practical matter I can't wait for that. Then the issue is
21 Federal Circuit decision on the May -- early May argument. I
22 think that is -- I think that's the when to be quite honest. I
23 could be wrong, but I think that's the when if -- if the
24 decision that comes out of that is affirmed, one word, boom.
25 Then your question of me is going to be, well, what about a

1 zillion dollar potential from Imation, and so I get to the
2 question ultimately that I sort of laid out there initially,
3 which is what's the affect of conversion on the Imation
4 litigation?

5 MR. SIROTA: And I'd like to respond to that together
6 with the effect of conversion on this entire case and the chaos
7 it will bring, and that is the following. At the very least
8 it's going to delay the trial of the Imation process. Your
9 point, Judge, on when, if the Federal Circuit rules, and in
10 your hypothetical gives a blanket affirmance, and Mr. Frazza
11 and his team are on their feet in the Imation case, you may
12 decide at that point in time that it's worth three weeks to see
13 if that trial bears fruit. You may not. It's an issue for
14 another day, but it will delay the trial, because a trustee is
15 going to have to become familiar with the case, the economics
16 of the case, the economics of whether Mr. Frazza is the
17 attorney then want to continue. Undoubtedly, it creates just
18 the ideal opportunity for Imation to come to the table and
19 present to a trustee an opportunity buy out potentially on the
20 cheap.

21 Imation's not here, because they're concerned about
22 their unsecured claimants. They're concerned about the
23 District Court litigation. It will result undoubtedly in a
24 loss of personnel -- people dedicated to the Imation and Jazz
25 process. I can't imagine that you're going to have Jazz

1 personnel interested in hanging around a corpse of a company to
2 assist Mr. Frazza and his team in the litigation. You're going
3 to have the post-petition administrative claims in this case
4 balloon. The three million dollar post-petition claims that I
5 referenced during the status portion of today's hearing is
6 going to be fixed at three million, but let's add a few more
7 things on top of it.

8 WalMart, who's waiting for their product, is going to
9 come to this court and file a massive administrative claim.
10 Fuji will have the opportunity in this court or some other
11 court to assert an administrative claim that a trustee will be
12 probably disinterested in fighting the way Jazz may be
13 interested in contesting it. So when the conversion dust
14 settles, on top of that, on the Imation litigation, you have
15 experts to find. We have a motion pending before the Court
16 with respect to bond proceeds, and hopefully, the ability to
17 pay those experts to fund the Imation litigation.

18 How's a Chapter 7 trustee going to fund those
19 expenses? So you're going to have a deterioration in the
20 Imation litigation, but more importantly, you're going to have
21 complete chaos and the immediate creation of administrative
22 claims that now will have to be satisfied before the unsecured
23 creditors in this state see one nickel, and to me that is the
24 most damaging part of Fuji's request and using a non-binding
25 decision to get there. And I do understand, Judge -- and I'm

1 not standing here before the Court as a fiduciary for this
2 estate and saying 26 months after ITC-2. That's not my point
3 at all. The when, as I suggest to the Court, is the Federal
4 Circuit on whether they spread the litigation, and at that time
5 Your Honor can make the determination whether there's another
6 implication to when, but it's certainly not today, with all due
7 respect.

8 THE COURT: Mr. Rosenthal or Mr. Etkin, would you
9 address that question?

10 MR. ETKIN: I'd like to respond to that, Your Honor,
11 and a couple of other questions that the Court posed, if I can
12 just go back a little bit?

13 THE COURT: Go ahead. We have to give you enough
14 time. Go ahead.

15 MR. ETKIN: Your Honor, you asked Mr. Sirota about
16 whether Fuji is entitled to conversion at this point given the
17 events that have taken place. Mr. Sirota I think responded by
18 saying that Fuji is asking for more than they would've been in
19 a position to get had this Chapter 11 not been filed, assuming
20 that we had our remedies outside of Chapter 11, and Mr. Sirota
21 makes that point in his papers, too. That we're looking to get
22 more than we otherwise would've had, because by virtue of the
23 conversion the debtor is liquidated.

24 Well, we said this in our papers, and I think it's
25 obvious, Your Honor. Jazz filed for Chapter 11 protection in

1 the wake of a \$30 million judgment that they couldn't get
2 stayed, because there was no likelihood of success on the
3 merits with respect to their appeal. They're in Chapter 11
4 because of their choice. We didn't file an involuntary to put
5 them into Chapter 11.

6 Secondly, Your Honor, if there was no Chapter 11,
7 what remedies would we have? Well, one remedy that Mr. Sirota
8 fails to talk about, and that is we can go ahead and execute on
9 our judgment, and by virtue of executing on a \$30 million
10 judgment that they couldn't bond and would not be stayed, what
11 would the ultimate impact be on Jazz in that event? I would
12 suggest, Your Honor, that by virtue of executing on the
13 judgment it would be more than likely that Jazz couldn't
14 survive with respect to having to pay that \$30 million judgment
15 at the time.

16 So we're not looking to exercise remedies that we
17 can't exercise outside of Chapter 11. We're looking finally to
18 bring some closure to the issues that the Judge has been
19 looking -- that Your Honor has been looking very carefully at
20 over a 15 or 16-month period and weighing carefully that issue
21 that the Court has posed today, which is where do you draw the
22 line and by virtue of all that has gone on in the past and by
23 virtue of the final determination.

24 Now Mr. Sirota keeps talking about non-binding. Your
25 Honor, it's akin to a bifurcated trial where you have a

1 determination of liability, and then you're just waiting for
2 the damages. The damages are really not relevant in terms of
3 what the ITC levies as a penalty. It's not going to be good no
4 matter what the number is, whether it's 13 million, 10 million,
5 8 million. It's not going to be good. What has been finally
6 determined by the ITC and something that this Court has been
7 waiting for by virtue of statements that this Court has made on
8 the record, statements that Mr. Sirota has made on the record.
9 Mr. Sirota quotes Mr. Rosenthal. Let me paraphrase Mr. Sirota,
10 which I paraphrased in the past, where Mr. Sirota said -- and I
11 think it was the July 11th hearing -- that the debtor will put
12 its proof before the ITC to make everybody comfortable that
13 this Court is not being used as some haven to continue to
14 infringe on Fuji's patents.

15 Now I don't fault Mr. Sirota for not keeping his
16 promise in that respect. I don't really look at it as a
17 promise, although it may have been phrased that way. But the
18 fact is that back on July 11th we were supposed to wait for the
19 ITC to come down with a final determination as to post-petition
20 infringement. The parties in this case executed a stipulation
21 to go before the ITC with respect to a determination of post-
22 petition infringement. The EID-2 came out, but that was non-
23 binding. We urged the Court at that time to act. The Court
24 stepped back, looked at the circumstances, and said now was not
25 the time. Let's wait and see what the ITC has to say.

1 Well, the ITC has come out, Your Honor, and said it.
2 It's binding. There are rights of appeal, but it's binding.
3 These are facts. When Your Honor quoted from Judge Luckhern's
4 150-page decision, you were quoting findings of fact that the
5 ITC has now blessed from a liability perspective. What the
6 number is, I don't know.

7 Your Honor, if we're going to pose questions that
8 need to be answered, I would suggest one other question, and
9 what I believe is a very important question. Has this debtor
10 earned the right to have this Court maintain the status quo in
11 this case to allow the debtor to continue to act and let's say
12 potentially we believe likely -- more than likely continue to
13 infringe? Has the debtor earned that right? We've waited,
14 Your Honor. We've financed this case.

15 The administrative claim -- and I understand that's a
16 subsidiary issue as far as the Court's concerned in terms of
17 determining that motion today, but let's face it, there's an
18 administrative claim looming there somewhere at some point, and
19 it more than likely continues to grow. And when you talk about
20 the point to draw the line and the suggestion being waiting for
21 the Federal Circuit on Judge Hochberg's decision, I submit,
22 Your Honor, that that's not the place to draw the line. We're
23 at the place where the line should be drawn, because even if
24 that judgment is overturned -- highly unlikely, but we're
25 raising a lot of hypotheticals today. Even if that judgment

1 were overturned, that does not impact the fact that the ITC has
2 now determined that the period of August 21, 2001 to December,
3 2003 there has been massive infringement of Fuji's patents,
4 including a seven-month period post-petition. That we know.

5 Fuji's judgment may be impacted by some decision by
6 the Federal Circuit, but that has nothing to do with the
7 determination that has been made in connection with the post-
8 petition period.

9 THE COURT: Well, it might. It depends on the basis
10 of that decision, but I understand your point, and your points
11 are well taken. I mean --

12 MR. ETKIN: Your Honor, I'm not going to get into the
13 methodology that the debtor now alleges it has undertaken. I
14 believe there's been enough discussion about that, but let me
15 address specifically some of the other things that Your Honor
16 has asked Mr. Sirota.

17 THE COURT: But let me say this, if I may, and -- if
18 this Court were to conclude that the cop on the beat, Customs
19 is on the job now -- and that may be a conclusion that is
20 subject to dispute. I understand, but if I were to conclude
21 that, what's the harm in waiting for ITC to finalize the
22 penalty phase and/or the Federal Circuit to decide on the
23 appeal from Judge Hochberg's judgment.

24 MR. ETKIN: Your Honor, I'll tell you what the harm
25 is, because what the ITC determines from a penalty standpoint I

1 submit is not what this Court should necessarily be looking at.

2 It's really the underlying liability for patent infringement --

3 THE COURT: They infringed. I'll assume --

4 MR. ETKIN: -- for the administrative period. Now

5 what the I --

6 THE COURT: I'll assume they infringed.

7 MR. ETKIN: What the ITC's administrative claim may
8 be is separate and apart from what Fuji's administrative claim
9 may be, and that has nothing to do with what the ITC assesses
10 as a penalty in this case for infringement post-petition.

11 THE COURT: No, but my point is this. My point is
12 this. As long as that administration claim -- I mean it is
13 what it is. As long as it's not increasing because the cop on
14 the beat, Customs is doing its job -- again, an assumption,
15 and we can debate that -- why shouldn't we wait to see what
16 happens in the two areas that I mentioned? What's the cost?
17 Is there a cost? Am I missing something, Mr. Rosenthal?

18 MR. ETKIN: I'm going to defer to Mr. Rosenthal.

19 MR. ROSENTHAL: Your Honor, you made an observation
20 some ago that we're all wandering in fields that we're not
21 particularly experienced.

22 THE COURT: I take that as a gentle reminder, and I
23 appreciate it. Go ahead.

24 MR. ROSENTHAL: I most of all learned more about
25 bankruptcy than I care to learn in my career, but I come to

1 this Court not as a bankruptcy lawyer but as an intellectual
2 property lawyer, and I view this -- you asked what is the harm,
3 and I go back to the first day when I perhaps injudiciously
4 used the word enabling.

5 THE COURT: No, I think it was injudicious.

6 MR. ROSENTHAL: But it has been a word -- a constant
7 theme throughout the last 15 months.

8 THE COURT: And it resinates. I don't -- I -- you
9 know, I think it was a contribution. Go ahead.

10 MR. ROSENTHAL: So you asked what the harm is, and I
11 say that the harm is to the system if to nothing else. That
12 the mental impression that my client has of what's going on
13 here -- and Your Honor said we should balance the interest of
14 Fuji against the interest of the debtor here -- is we have a
15 company who has poked its thumb into the eye of the law
16 repeatedly and has been caught four times. Bodies --
17 administrative and judicial bodies have found them to be
18 infringers, and all the law does is say hit me again.

19 What we have here is this Court said let's start
20 again. It's a new world. On May 20th we won't care about what
21 happened before. That was then, and this is now, and by the
22 way, I do believe that what happens in the Federal Circuit
23 cannot or will not affect what happens in the ITC. We have a
24 different body of infringements, a finding of an administrative
25 body as to what the Federal Circuit said in a non-appealable,

1 final decision from 2001. Applying that decision, that's what
2 we got. The District Court applied it, we applied it, but it's
3 still -- it's a separate transaction.

4 So what do we have here? We have a period of 15 months
5 during which the record would more than suggest there's a
6 determination by a duly constituted regulatory agency who's
7 charged with the responsibility of making that determination.
8 There has been infringement and not just, you know, a couple of
9 cameras here and there. We're talking about post-petition --
10 seven months' worth of infringement. In 2003 that amounted to
11 84 percent of the cameras. They're getting better. They went
12 from one percent to 15 and a half percent, but that certainly
13 is -- as I said before, you can't be a little bit pregnant.

14 Now I'm told that we should wait some more, because
15 maybe the cop on the beat will turn them off, but that's not
16 the issue. The issue is that the evidence in front of Your
17 Honor from the viewpoint of the prospective of a --

18 THE COURT: Is that they infringed in the
19 administration period when they said they weren't going to.

20 MR. ROSENTHAL: Exactly, as they told every judicial
21 body or administrative body, they were not infringing. And
22 having gone across that line, having gone --

23 THE COURT: But if I were convinced of two things,
24 Mr. Rosenthal -- and I hear what you're saying, and I don't
25 discount it or disregard it. I'm just trying to assess whether

1 I should go back to day one, or I ought to evaluate it right
2 now. If we have a conclusion that there was administration --
3 infringement in the administration period, which is the
4 question I asked of Mr. Sirota, is that it? Should once -- if
5 I were to decide that, if there were no comebacks from Mr.
6 Kaplan, etcetera, should I just say, "Ah, I was here on the
7 first day, the petition date, and Mr. Rosenthal said I'm
8 enabling, and low and behold here was infringement, and in that
9 sense there was enabling, and there's damage to Fuji, and
10 there's an administration claim for seven months' worth of
11 infringement, etcetera, maybe more?" That's just seven months
12 in 2003.

13 MR. ROSENTHAL: Let's not forget --

14 THE COURT: I understand.

15 MR. ROSENTHAL: Let's not forget that there's an
16 inventory in the United States.

17 THE COURT: I understand. That's why -- and we only
18 measured it up to December 31, '03, and we come forward into
19 '04. But having said all that, if on the other side of it this
20 Court is convinced, well, now they have it together and now
21 Customs is not going to stop the importation, because they're
22 convinced by counsel, etcetera, why -- what's the harm in going
23 forward now?

24 MR. ROSENTHAL: As I said before, Your Honor, first
25 of all, assuming for the purposes of discussion that they have

1 got it together, which there is no credible evidence, the --
2 there is an inventory of cameras in the United States that has
3 passed through Customs which are not going to be recalled,
4 can't be recalled, and can be sold tomorrow. Maybe as we speak
5 they're busy being distributed. That's a harm to Fuji -- the
6 continued infringement.

7 Fuji is harmed by the existence of a company -- in
8 fact, the system is harmed by the existence of a company who
9 used the procedures of Chapter 11 and misused them, because
10 what was their business during the last sixteen months?
11 Eighty-five percent of that business was selling cameras which
12 85 percent of which were found at least up to a period at the
13 end of 2003 to be infringing, and there's been no change. I
14 mean as best as I can determine, the changes are less than
15 cosmetic, and, in fact, maybe it got worse if I'm to take Mr.
16 Benun's declaration -- affirmation at face value.

17 THE COURT: Let me just ask this, if I may. You
18 know, Fuji and Jazz went down the ITC customs trail by
19 agreement, and don't you have to live and die by that program?
20 Now doesn't that program include this upcoming phase where
21 Customs is getting apparently active. As of August 4th, they
22 did this, that, and the other thing. They retrenched as of
23 last week or this week, but that effort by Customs to keep out
24 infringing cameras is what you bargained for. Isn't it? And
25 if it works --

1 MR. ROSENTHAL: Your Honor, what I bargained -- what
2 I bargained for was for the ITC to tell us whether or not they
3 are, in fact, infringing. I didn't bargain with the last word
4 of the last agency to determine what to do. I find it
5 interesting that we're now being asked --

6 THE COURT: But let --

7 MR. ROSENTHAL: Fuji is know being asked in essence
8 to fund an effort to thwart whatever Customs thinks is
9 appropriate.

10 THE COURT: The Customs keeps the units out.

11 MR. ROSENTHAL: That doesn't alter. That's a -- Your
12 Honor, with all due respect -- and I defer to --

13 THE COURT: It's not going to affect the current
14 inventory for one.

15 MR. ROSENTHAL: For one, and it's not going to affect
16 the fact, and I think that's the --

17 THE COURT: Fact of infringement?

18 MR. ROSENTHAL: Infringement during the course of
19 this proceeding.

20 THE COURT: You're right.

21 MR. ROSENTHAL: And I think that that is critical.

22 THE COURT: You're right, and that's why I asked the
23 question if there were no doubt -- if we took all the doubt out
24 of the ITC -- and you have no doubt -- the ITC finding, would
25 that be enough right there? Could this Court in a sense take

1 offense at the infringement during the administration period
2 and say, look, that's not what we were designed for as a
3 Bankruptcy Court and conversion right then and there?

4 MR. ROSENTHAL: Your Honor, I would defer --

5 THE COURT: And you heard the response.

6 MR. ROSENTHAL: I would defer to Mr. Etkin except to
7 say that the dignity of the law of which I have a great deal of
8 respect -- I've been doing this for 40 years. The dignity of
9 the law actually demands that this Court take offense, because
10 the premise under which this Court has acted over the last 16
11 months is we're going to win in the ITC. Let's just give them
12 a shot. That has been the premise, and every time we come to
13 court we've been told this, and every time we've come to court
14 Your Honor has said, "Well, let's give them another few
15 minutes. Let's give them another few days." You've told us
16 not to do anything for a long period of time at the end of last
17 year, beginning of this year, and we didn't. We thought we had
18 a decision.

19 THE COURT: You're right.

20 MR. ROSENTHAL: We thought we had a decision in
21 April.

22 THE COURT: I did tell you that. You're right.

23 MR. ROSENTHAL: Your Honor, let me --

24 THE COURT: I just don't know that that is the full
25 answer, but it is influential. Yes.

1 MR. ROSENTHAL: Let me address from -- or at least
2 try to address from a bankruptcy perspective, and this will
3 also address some of the statements that Mr. Sirota made. Your
4 Honor, it is our position that by virtue of the post -- the
5 seven months of post-petition infringement that we know about,
6 that this debtor doesn't deserve. In answers to the question I
7 pose, doesn't deserve for the status quo to be maintained any
8 longer.

9 But it's not just that, and we have tried, and I
10 think our papers indicate that we have tried to also look at
11 this from the perspective of the case as a whole not just Fuji.
12 Let's look at the case as a whole. This debtor to date,
13 through August -- despite whatever allocation Mr. Sirota was
14 talking about before, this debtor has lost three and a half
15 million dollars to date. Now Mr. Sirota will say, "Well,
16 that's all legal fees." That's like saying, well, you know, if
17 you just take the rent out, or you take the legal fees out, or
18 you take some other expense out, you know, then we'll be making
19 a profit. It's three and a half million dollars in the hole.

20 By virtue of its last operating report in August,
21 which we were just handed this morning, its asset value has
22 declined in the aggregate to the tune of approximately four
23 million dollars plus, and it's operating. Okay? Their
24 numbers. Your Honor, administrative claims continue to mount.
25 How do unsecured creditors fair in this case as administrative

1 claims continue to mount? By virtue -- whether it be
2 additional legal fees, whether it be additional infringement,
3 whether it be the ITC's claims, they continue to mount, and the
4 debtor has conceded that it's not going to fund any payment to
5 unsecured creditors and administrative creditors through its
6 operations. How is it going to fund payment?

7 It's going to fund payment through a contingent,
8 unliquidated litigation claim that is scheduled to go to trial
9 in January of 2005. And I submit, Your Honor -- and you've
10 asked the question. I think it's a very important question. I
11 submit that we argue and continue to argue, and I think it's
12 been conceded, that Mr. Frazza in this for the long haul, and I
13 respect him for that. He's in it for the long haul.

14 Now is a trustee actually going to come in and take a
15 look at what's been done by Mr. Frazza and the Budd Larner firm
16 and say, "Well, I don't know. I think I'd rather go to
17 Wilentz, and let them start from scratch?" That's ridiculous.
18 Now if we convert the case today with a trial date in January,
19 again the parade of horrors that Mr. Sirota was talking about
20 if we convert the case, you have a Trustee -- a very capable
21 Trustee in this jurisdiction, which Ms. Jurow will suggest and
22 which the Court will appoint, that will have an opportunity
23 over the next three months prior to trial to get involved.
24 This trial has every ability to go forward in January as it is
25 presently scheduled.

1 That's the assets in this case, and you're talking
2 about an asset that will continue to exist post-conversion.
3 And what's going to happen? A trustee's going to come in, and
4 Mr. Sirota says, "Oh, the Trustee will settle on the cheap.
5 They're going to settle on the cheap." Granted, the Trustee
6 will not have the same agenda as Mr. Benin has in connection
7 with settlement. The Trustee is an independent fiduciary that
8 I'm assuming, and I think we all should assume, will exercise
9 that fiduciary duty, and if there is a settlement, that
10 settlement will see the light of day in front of Your Honor,
11 and Your Honor will have to approve it as fair reasonable. So
12 I don't understand that problem.

13 Now again it's not the operations of the debtor that
14 are going to pay off these creditors. It's not the operations
15 of the debtor that's going to pay off Fuji's administrative
16 claims or its pre-petition claims. It's Imation, the Holy
17 Grail. If you think for one minute -- and look, I could be
18 wrong, Your Honor. I'm creating a hypothetical myself, but if
19 Mr. Benun's obligations with respect to that judgment can be
20 fully paid off if that case is successful or paid off
21 dramatically if that case is successful, is he going to
22 disappear and risk that the only possible way that his economic
23 salvation will be compromised by virtue of his lack of
24 participation? I don't know. I'm suggesting that I don't
25 think that's going to happen. It shouldn't happen.

1 THE COURT: So you see a benefit to the --

2 MR. ROSENTHAL: I see --

3 THE COURT: -- Imation case as a function of getting
4 a trustee in there. Let me hear --

5 MR. ROSENTHAL: I see an absolute benefit, Your
6 Honor.

7 THE COURT: All right. Let me hear from Mr. --

8 MR. ROSENTHAL: Not only to Fuji but to the entire
9 creditor body.

10 THE COURT: All right. Let me hear from Mr.
11 Greenberg. He's been patiently standing by.

12 MR. GREENBERG: Your Honor, as I sat throughout the
13 main combatants, there were some thoughts that crossed my mind,
14 and the Court itself has raised the two that I think are most
15 important. But I want to digress for a minute and talk about
16 the composition of my Committee, because it has three members,
17 two of whom who have had absolutely no business dealings I
18 believe with the debtor during the Chapter 11 period. One is
19 Jevick Transportation, which serves as the Committee chair, and
20 I don't think they've done any trucking for the company, and
21 the other is the law firm that had represented the debtor in
22 the Jazz litigation which gave rise to the \$30 million
23 judgment, and I know they've had no continued involvement.

24 The third member is Leon Silvera who sits as proxy
25 for Polytech, and in the most recent meetings -- and we

1 furnished the voluminous pleadings to the Committee members. I
2 don't know that they read everything, but we gave them an
3 opportunity to and then discussed it at length as recently as
4 last week. And because there was an issue about the Polytech
5 and Silvera potential interests in ongoing operations, when it
6 came time to vote on the Committee's position, Mr. Silvera did
7 not vote. The other two Committee members did vote to support
8 the debtor and oppose the motion for conversion, certainly, the
9 allowance of an admin claim, and they didn't have as much of a
10 concern, because I deem it to be more of a legal issue about
11 the stay relief application by Fuji. They believe that this is
12 a company, even though they have no personal interest in it,
13 that can be viable and can ultimately, when it gets beyond a
14 lot of litigation and litigation costs, make some money, and
15 they would like to see it survive.

16 Two of the points that were made, Your Honor, are
17 ones that I was going to make. You set guidelines, whether
18 you're playing football, the field's 100 yards as opposed to
19 some other number in Canada, and in this case we also set
20 parameters. There was going to be a process not here but
21 before the ITC, and it was going to have a number of steps
22 along the way and ultimately it would be finalized. My view
23 and the Committee's view is that that has not been finalized,
24 and until it is, number one, it may not be binding on the
25 Court, but even the weight that the judge should give to it is

1 somewhat compromised by the fact that it doesn't have finality.
2 That's number.

3 Number two is your concept of the cop on the beat. I
4 think this case lives or dies if the Court were to do nothing
5 today with Customs, and I think Customs has been evenhanded
6 throughout the process. They've allowed product in, and when
7 they thought there were new regulations promulgated, they kept
8 product out, and now those regulations, we've heard from Mr.
9 Peterson, are going to be set aside potentially, and maybe
10 they'll let the product in, or maybe they won't, or maybe
11 they'll let some in, and they'll keep some out. The only thing
12 that I understand Customs found the debtor in possession to
13 violate was under those new guidelines not coding or putting
14 serial numbers on each individual unit, which was an
15 unreasonable burden, and that's no longer enforced.

16 But if, in fact, there are other categories of
17 compliance that this debtor in possession has failed to meet,
18 customs is going to keep the product out. There's no income
19 stream. We will, as a debtor, default on shipments to WalMart
20 and others, and this case will be over, not because this Court
21 entered an order of conversion, but because the company could
22 not longer operate. I think that that's something that will
23 probably be resolved in the short term, and I think just as
24 parties said we're going to live with the ITC's final decision,
25 everybody agrees that customs is the cop on the beat. When

1 they say the game is over and the puck doesn't come in, that's
2 the end of it. Again subject to the short-term appeals or, you
3 know, other process that is inherent in what customs acts on.

4 And I think that given the fact that the Federal
5 Circuit could be ruling very shortly, and that makes a big
6 difference in sales. If they set that judgment aside, the
7 landscape of this estate is dramatically changed. My
8 recollection is that we had about \$41 million of claims at the
9 time of filing. Fuji for 30, which is on appeal, related
10 parties, maybe Jazz Hong Kong for nine, which everybody agrees
11 is subordinate, and the pure unsecureds that I represent,
12 approximately two million, and I'm assuming that that could
13 swell a little with some rejection claims. But if the Fuji
14 judgment got knocked out, I don't know how anybody on that side
15 of the room can say that doesn't have a material impact on this
16 case and what an ultimate payment to creditors might look like.

17 I think that that is something that could be
18 concluded very quickly. I have to think that some of Mr.
19 Etkin's points are well taken. I'm sure that if the case got
20 converted, in candor somebody would find a way to prosecute the
21 litigation, and I would assume that Mr. Frazza, who's done I
22 believe a very competent job for the estate, would be the
23 likely choice to go forward. I think that -- again, I
24 understand when somebody makes a compelling argument. Mr.
25 Etkin made one. It's to Jack Benun's self-interest to

1 certainly participate in prosecuting that litigation, but that
2 should not be the sole determinant as to whether or not this
3 case ends today, because I think that litigation is out there,
4 and it's a source of recovery. There's an entity that may be
5 viable. There's an entity that has apparently attempted to
6 comply with changing guidelines about importation and what
7 constitutes infringement, and other than the last ruling, which
8 was recently set aside, customs has found from day one of this
9 Chapter 11 they have complied. They allowed every single
10 shipment, I believe, into this country.

11 I think that should be a significant factor in this
12 Court's determination as to whether or not today is the day we
13 convert the case, and on behalf of creditors I would suggest
14 that today is not the day, and we ought to see what Customs
15 does over the very short term, whether that means two weeks or
16 30 days, and I would certainly suggest that no action should be
17 taken to end this Chapter 11 process today until we see what
18 Customs does. Thank you.

19 MR. ETKIN: Your Honor, may I just comment on Mr.
20 Greenberg's statement?

21 THE COURT: All right, and then I'll hear from Mr.
22 Kaplan. Just briefly, please.

23 MR. ETKIN: Just to comment on a couple of points
24 that Mr. Greenberg made. Mr. Greenberg has referred to Customs
25 as the cop on the beat. Well, this particular cop on the beat

1 has been either asleep or having donuts for the last God knows
2 how many months, because --

3 THE COURT: There's an inconsistency between what
4 they have done and what the ITC --

5 MR. ETKIN: No question about it.

6 THE COURT: -- has decided here.

7 MR. ETKIN: Where's the proof that Customs has opened
8 up one box and looked and inspected and asked the questions and
9 whatever? They simply have not done their job.

10 THE COURT: Yes, they seem to have developed a change
11 in attitude since August.

12 MR. ETKIN: Perhaps there has been, but I don't think
13 -- they are not the final arbiter. The ITC is the final
14 arbiter as to whether infringement has occurred, and it has
15 occurred with this cop supposedly on the beat.

16 THE COURT: But your client wouldn't be put out if
17 Customs held out -- excluded all of the shells from this point
18 forward. In fact, that would be exactly what your client is
19 looking for.

20 MR. ETKIN: Well that would be one of the things that
21 my client is looking for, Your Honor, and let's -- again, let's
22 not forget this debtor is obligated as a fiduciary and under 28
23 USC 959 not to violate the law. They cannot violate the law.
24 They said they weren't. They -- Mr. Sirota indicated that they
25 would be vindicated by the ITC. It hasn't happened. It just

1 hasn't happened.

2 THE COURT: There's no question, Mr. Etkin, that the
3 ITC stamp of approval, if one wants to call it that, on EID-2
4 is a substantial negative, if not a death now for that Chapter
5 11, and I just have to decide which it is. Mr. Kaplan wanted
6 to --

7 MR. KAPLAN: Your Honor, I just want to make a couple
8 of brief points. One is Mr. Sirota said something before. He
9 said you should consider that EID and keep holding on, but you
10 shouldn't say today that's dispositive if it gets converted.
11 Let me just point out quickly three things. I agree with that.
12 You have to consider it. You can't just turn a blind eye, but
13 number one, Your Honor, the first ITC case would've closed Jazz
14 down, because the ITC ruled all reloading cameras were illegal.
15 That decision was ultimately reversed. You know, they talk
16 about failure of proof. The Federal Circuit clearly said in
17 that case you can reload cameras.

18 Number two --

19 THE COURT: Can I just stop you there? Because
20 though the ITC and the Federal Circuit sort of worked on
21 different pages, the net result of the Federal Circuit's
22 August, '01 decision to date is a \$30 million award against
23 Jazz.

24 MR. KAPLAN: That's correct, Your Honor, but the net
25 result of it also is that the injunction entered against

1 reloaded cameras by the ITC was lifted. That's also the net
2 result.

3 THE COURT: But let me just say this, because it
4 comes out, and maybe it's sort of a -- if there is such a thing
5 -- an intellectual property philosophical point, if that's not
6 a complete oxymoron. But what you are saying is -- and it's in
7 the papers -- you know, we never had a clear picture, because
8 we got varying standards from this, that, and the other
9 enterprise -- ITC, Federal Circuit, etcetera -- as if an
10 infringer, because that's the starting point, who then puts up
11 a defense to infringement and has to prove it is entitled to a
12 continuing road map as to what infringement is or isn't. That
13 seems to be -- it sort of pops out of what in particular you
14 say.

15 Now the truth of the matter is that Mr. Benun went to
16 Fuji for a license, didn't get it, and decided to take his
17 chances, and this is a point I've made in a written opinion
18 before. Now the fact that he didn't have a clear road map is
19 just a jeopardy of that kind of business. You're not going to
20 get a federal agency or court to say, "Here it is. If you do
21 exactly this and things don't change in this area, you've got a
22 clean bill of health." That's too much to expect in this area,
23 and it does come out of your papers.

24 MR. KAPLAN: Your Honor, I don't disagree with that.
25 The only point I'm trying to make is that the original decision

1 from the ITC, which effectively said -- I don't think you've
2 ever seen that. I'm not sure you have, but the original 1999
3 decision that was adopted by the ITC --

4 THE COURT: If I did see it, I flushed it out,
5 because it's too much --

6 MR. KAPLAN: That decision said reloaded cameras is
7 illegal. It's enjoined. At that point, Your Honor, Customs
8 shut the borders, and our cameras were locked up. The company
9 was out of business. That decision was reversed. The Federal
10 Circuit admittedly put limitations, and there's this road map
11 and eight steps or 19 steps, but clearly, there a way to reload
12 these cameras legally.

13 So the point I'm trying to make, Your Honor, is that
14 while obviously you have to go by this decision, you can't turn
15 a blind eye, the decision they had on this before was wrong.
16 This very week, Your Honor -- this week -- I think it was two
17 days ago -- there's a Federal Circuit decision that was an
18 appeal from an ITC case. I remember the ITC case. When it
19 came out, there was all this press. There was a whole big
20 debacle that the company had put the thing down in the trash,
21 and the Federal Circuit said that the ITC couldn't even figure
22 out what the patent meant, and they reversed them on I think
23 four out of five or three out of four. They didn't even get
24 past what the patent meant, and they sent it back to them.

25 THE COURT: But what am I to do with that? What am I

1 to do with that? Am I to be a super ITC? What is --

2 MR. KAPLAN: What I'm telling you to do, Your
3 Honor --

4 THE COURT: Yes.

5 MR. KAPLAN: -- is -- what I'm telling you to do is
6 in view of the history of this --

7 THE COURT: Yes.

8 MR. KAPLAN: -- I'm telling you to let us get to the
9 appeal, because the appeal --

10 THE COURT: The appeal from this?

11 MR. KAPLAN: Yes, let us get to the appeal.

12 THE COURT: The new appeal. Is that a two-year
13 process?

14 MR. KAPLAN: Probably not. Probably --

15 THE COURT: The last one took 26 months. You know, I
16 counted it.

17 MR. KAPLAN: Yes, but the last one was a very, very
18 extremely long one. I have an appeal that I argued last --

19 THE COURT: Half that time, 13 months?

20 MR. KAPLAN: Your Honor, I had an appeal that I
21 argued --

22 THE COURT: How much time?

23 MR. KAPLAN: Anywhere from, I don't know, four months
24 to ten months/11 months. I can tell you two recent --

25 THE COURT: How much money?

1 MR. KAPLAN: Not much, Your Honor. It's just the
2 briefs are mostly the same -- you know, pretty much the same
3 substance that was in there. I've had two appeals that I've
4 been involved in, Your Honor, in the past year. One was
5 decided about I think eight weeks after it was argued. One
6 took I think about four months.

7 THE COURT: Look. Mr. Sirota, I know you want to
8 respond, but let me get back to Imation for a moment, because I
9 don't want to lose site of it. One could start over again.
10 It's late in the day, and everybody has heard it all we think,
11 but suppose -- pick a number -- \$50 million. Okay? What
12 happens to it?

13 MR. SIROTA: What happens to the money? The money
14 comes into this estate, and it's distributed to -- after --

15 THE COURT: Fuji gets how much of it?

16 MR. SIROTA: It depends if Fuji can establish before
17 this Court or another court --

18 THE COURT: Let's assume -- okay. You're right.

19 MR. SIROTA: -- an admin claim.

20 THE COURT: Let's assume their \$30 million basic pre-
21 petition claim stands up, and let's assume that the \$13 million
22 claim divided between admin and pre-petition stands up. You've
23 got a couple million dollars worth of claims from others.
24 You've got a three million hole plus in administration
25 professionals, etcetera. You've got Mr. Frazza's firm -- and I

1 don't say this with an edge. Don't misunderstand me -- taking
2 ten percent up to a million seven.

3 MR. FRAZZA: Seventeen million which equals one point
4 seven.

5 THE COURT: Yes.

6 MR. FRAZZA: That's correct, Your Honor.

7 THE COURT: Okay? And that's the way it goes.

8 That's \$50 million.

9 MR. SIROTA: Yes, but we have --

10 THE COURT: Okay. We don't have a lot of \$50 million
11 judgments in this courthouse, but I could be wrong. It could
12 be \$250 million. I don't know. Or it could be two cents. You
13 know, it's a blind item for me. Do I consider that? So when I
14 ask the question what's the impact of conversion on that, I'm
15 not sure that that's necessarily on the table in the
16 decisionmaking process. I'm not sure. It might be, but I'm
17 not sure. So I'm back to the Federal Circuit on the Hochberg
18 judgment, which I think we agree is something we'd all like to
19 know right now, one way or the other.

20 MR. SIROTA: Sure.

21 THE COURT: Mr. Rosenthal, let me just ask you, if I
22 can -- that's going to be decided when as you know it?

23 MR. ROSENTHAL: Your Honor, my crystal ball got --

24 THE COURT: And I want your testimony on this point.

25 MR. ROSENTHAL: Your Honor, I haven't the slightest

1 idea. There was no --

2 THE COURT: What's your guess?

3 MR. ROSENTHAL: I would guess -- I would've guessed
4 in the next month or so -- three months. There's no way of
5 knowing. The Federal Circuit is imponderable in this regard.
6 There's no way to predict --

7 THE COURT: Mr. Kaplan, can you -- Mr. Frazza, your
8 firm argued the case?

9 MR. FRAZZA: Well, my partner argued it. Mr. Jacobs
10 was on the site every single day looking for --

11 THE COURT: As we did the other day, yes.

12 MR. FRAZZA: I'm sure you did, but I think Mr.
13 Rosenthal and I would agree it's just impossible to predict
14 given the decisions that you see, and when they were argued,
15 there's no real regularity of this one would be argued and
16 decided and then this --

17 THE COURT: And you don't think that I should suggest
18 to Judge Linares that he call the Federal Circuit and -- no,
19 no, no. I'm --

20 MR. FRAZZA: You almost had me saying yes there.

21 THE COURT: All right.

22 MR. SIROTA: Judge, we would love to have that
23 decision, and just as importantly, we would love to have Mr.
24 Frazza on his feet before Judge Linares today, but we don't
25 control either of those two factors, and we never did from day

1 one. But it is disturbing somewhat to hear Mr. Etkin say the
2 cop on the beat is asleep. They chose that precinct. This
3 Court didn't design the strategy for Fuji enforcing its claims.
4 It came here, I think the Court even pointed out at one point,
5 somewhat belatedly for stay relief. It didn't come the first
6 day of the case. It went before the ITC. This very
7 experienced counsel to Fuji understood who the cop on the beat
8 was having extensive experience, and put themselves in the
9 hands of the cop on the beat. It's disturbing to continually
10 hear that somehow either this debtor and its fiduciaries, which
11 they are not -- their motivation is very different -- and this
12 Court has enabled anything other than the process moving
13 forward with as quick dispatch as could humanly move forward.

14 Your Honor never stood in the way of Fuji's strategy.
15 In fact, Judge, until you mentioned at a hearing the prospect
16 of perhaps Fuji going to the District Court, it was never even
17 on the table. After Your Honor mentioned it, in came the
18 motion for stay relief to go before the District Court.

19 THE COURT: Yes.

20 MR. SIROTA: At no time --

21 THE COURT: Your point is well taken on the process
22 selection, and there will be a disagreement on whether Customs
23 was sort of part of that continuum or not, but I think it's at
24 least reasonable to say that it was just as it might be argued
25 that it wasn't. But, Mr. Sirota, the face of the Bankruptcy

1 Court question that's been raised by Mr. Etkin and then very
2 pointedly by Mr. Rosenthal is a significant question. I mean
3 if one were to conclude that there truly was infringement --
4 and I understand that it's a complex area, but you know, the
5 burden is on the debtor here, and if there was infringement,
6 and if it did result and will result in a multimillion dollar
7 award including an administration claim and if all the ifs are
8 removed from that, which you're going to go to I'm sure, it is
9 a problem for this Court, and it's -- whether it's the ultimate
10 question or not, I'm not sure, but it might be. It really
11 might be, and it might just put this Court in a position where
12 the chips will fall where they fall on Imation, and whatever
13 happens on appeals happens on appeals. It is a grave concern,
14 and I think -- I understand sort of the business model, but the
15 business model is a model that accepts the risk, and so far at
16 every turn notwithstanding what Mr. Kaplan might characterize
17 as a win in the Federal Circuit that turned to dust in a \$30
18 million negative -- Judge Hochberg.

19 Now I do understand spilt milk and where we are now
20 and that one has to stand here and make the analysis and not go
21 back to May of '03. I will -- I'll give you another two
22 minutes, and then I'm going to tell you what I'm going to do.

23 MR. SIROTA: Judge, the ifs that you pose I think
24 should be balanced with what's pending, and hopefully, because
25 we don't control it in site in the Federal Circuit decision and

1 the Imation trial. But as you balance the ifs, Mr. Etkin
2 talked about the Imation litigation and Mr. Frazza's going to
3 go forward, and nobody disputes that. He's standup person at a
4 standup firm, and they'll carry the torch on the Imation
5 litigation, but Your Honor waves the wand on conversion and
6 cuts this program short. No one's addressed the immediate
7 accumulation of administration claims that will dramatically
8 erode the \$50 million hypothetical.

9 THE COURT: All right. Let's --

10 MR. SIROTA: The vendors and people that have done
11 business --

12 THE COURT: You're right.

13 MR. SIROTA: -- with this particular debtor are going
14 to become --

15 THE COURT: Let's say that it erodes it. See, that's
16 -- you take \$50 million. Again just hypothetically. The
17 biggest hit is going to be suffered by Fuji in terms of raw
18 dollars. The biggest hit --

19 MR. SIROTA: It all depends, Judge. If they come
20 here with an administrative claim against a trustee who's got a
21 burial fund of \$300,000 and knows nothing about patent
22 infringement and presents this Court with an admin claim of
23 15/20 million dollars, who's contesting that? They may get the
24 cream of the crop.

25 THE COURT: I'm assuming a better situation. I'm

1 assuming that the Trustee goes forward with Imation, and
2 there's \$50 million.

3 MR. SIROTA: And the \$50 million comes in, and Fuji
4 will have filed an administrative claim for its infringement
5 that will not be aggressively contested, because the Trustee
6 won't have the ability to do it, and they will take in the
7 administrative status --

8 THE COURT: But your point -- your point is that the
9 administration in the 11 -- and we're talking about the tiering
10 of administration claims, but the 11 tier will be swelled by
11 WalMart, for example. That's the horrible that you paraded.
12 Well, it may happen, but it'll happen to the detriment of their
13 claim just as their claim in your terms will be enhanced by
14 nobody seeking to seriously challenge it, because who wants to
15 pay for an appeal out of the ITC? So those are cross currents.
16 That's what would happen. If there's no money coming in, it
17 doesn't make any difference anyhow.

18 MR. SIROTA: That's true.

19 THE COURT: If Imation is a zero, it doesn't matter.

20 MR. SIROTA: That's true.

21 THE COURT: It's not -- none of it's worth a hill of
22 beans.

23 MR. SIROTA: And if the cop on the beat decides that
24 the product is excluded, then it doesn't matter either, because
25 operationally this case is over.

1 THE COURT: Well --

2 MR. SIROTA: But Fuji's asking that Your Honor just
3 intercede a little bit early. Judge, the ITC is almost done
4 with its business, but you have enough. Customs does a good
5 job when they rule in our favor but doesn't do a good job when
6 they rule in Jazz's favor. So just intervene, if you wouldn't
7 mind. Put the debtor out of business, and we'll be better off.
8 That's not a fair program. That's not a fair program for this
9 debtor. It's premature. The independent -- or the fiduciaries
10 in this case who represent clients that don't have competitive
11 motivation think it's premature. The agency that supervises
12 these Chapter 11 cases that rarely opposes conversion thinks
13 it's premature, and I think given that they chose their course
14 of conduct, they should let that roll out full-term.

15 And, Judge, with respect to this enabling, it'll be
16 my last point. Judge Hochberg in rendering her decision had
17 presided over a multi-week trial. A trial that resulted in a
18 \$30 million judgment. Comments that were made about Mr. Benun
19 that were not complimentary, and when faced with a request for
20 an injunction going forward said no. The ITC can handle. I
21 don't think this Court should take a more aggressive view and
22 give this particular entity, Fuji, more than they would get,
23 and I say more, because they were very happy with this debtor
24 in Chapter 11 and not moving to dismiss the case, so that they
25 could use the avenue of Chapter 11 to poke, explore, review,

1 which they've taken every opportunity to do. I agree with Your
2 Honor wholeheartedly. The very important when is coming, and
3 that's the Federal Circuit, and we'll have to deal with it, but
4 it's not today, respectfully, Judge. Thank you.

5 THE COURT: Thank you, Mr. Sirota. Mr. Rosenthal.

6 MR. ROSENTHAL: Your Honor, just the last point that
7 was made. Fuji was dragged into this Court involuntarily. We
8 were hardly the people who caused this proceeding to start, and
9 Fuji didn't have, it seems to me, very many options coming in
10 in terms of saying that this wasn't a proper bankruptcy. There
11 were debts as I understood the bankruptcy law.

12 But Fuji was also -- did make an election. It said
13 let's go see what the ITC feels about this issue, because at
14 least there's a body with some experience, has a track record
15 of moving relatively quickly, and it's in the best interest of
16 everybody to go down that road. But at no time in front of the
17 ITC and in front of this Court have we ever said Customs was
18 right. We always said -- in fact, if you read the end of the
19 opinion of the ALJ, he says Fuji wants us to write another
20 order to instruct Customs, but that's not necessary, so the
21 order is the same one that was issued in 1999, because Customs
22 will learn from what we say here today and what the Commission
23 may say or may not say in the future. Customs will how to do
24 it right, and there's a stirring. There's rumblings that maybe
25 Customs has learned it.

1 But the cop on the beat wasn't Customs. We didn't
2 gutter Customs. They fell down. We contended from the get go
3 that Customs wasn't doing their job, and we suspected it was
4 because they were being sold a bill of goods, and it turns out
5 that's exactly what the ALJ finds. The bill of goods was this
6 ICP system which was found to be worthless. Customs doesn't
7 have the vehicle for maybe making the kind of determination
8 that an administrative law judge can make with witnesses and
9 evidence and testimony, etcetera, but the bottom line is that
10 we went to the ITC, and for the purposes of this proceeding,
11 that's fine. There's nothing that the ITC can or will do
12 tomorrow or next year, whenever they decide the remedy issue.
13 They said that issue was gone. As Mr. Etkin pointed out, it's
14 a bifurcation.

15 We're going to consider what the right penalty is for
16 this wrongdoing, but we're not going to -- and it may be zero,
17 because maybe they'll look at Jazz and say as to Jazz, since
18 they're now gone, we won't levy any penalty, because it's a
19 waste of our time. But they may levy it against Mr. Benun
20 personally who's not gone, who's present, who they levy joint
21 and severally. But that's not the issue. The issue is that a
22 duly constituted body has decided that there has been post-
23 petition infringement, and Mr. Sirota, if I hear him correctly
24 -- I certainly heard him correctly until today, and he's
25 uttered the words today -- maybe we should wait for the Court

1 of Appeals, because it's not final until --

2 This is the body that both sides decided should
3 decide the issue. We took an option. We'll put aside my
4 injunction issue, because that's -- Your Honor said that's not
5 on the table, and I can defend my request for an injunction,
6 because an injunction would go beyond --

7 THE COURT: I didn't say it wasn't on the table. I
8 said it's really --

9 MR. ROSENTHAL: It's not here.

10 THE COURT: It's not the central focus.

11 MR. ROSENTHAL: Central point. All right. But what
12 I'm trying to say here is that we did play the game in
13 accordance with the script. We -- which didn't include
14 Customs. We went down that road. There was a vigorous defense
15 before the ITC. The ALJ determination was in a sense appealed
16 to the full Commission. The Commission said hell no. The
17 Commission said whatever the ALJ found as to violation and as
18 to the liability of Mr. Benun and Mr. Cosentino under the order
19 of the Commission stands, and I'm now going to turn to the
20 issue of remedy, which is a complex thing.

21 One of the findings of the ALJ, which is a remedy
22 finding really, is that there was bad faith which warrants a
23 large remedy. Thirteen point six seven five million dollars is
24 the largest remedy, if issued, ever issued by the ITC in an
25 enforcement proceeding. It dwarfs everything else, but it's

1 less than \$154 million which was the maximum exposure. Only
2 reflects the fact that there's a realism somewhere in the --
3 among the ALJ that \$154 million could never be collected, but
4 be that -- and 13.675 in relation to an alleged claim of \$250
5 million in Imation maybe can be collected. But the bottom line
6 is that we've walked down the road that was set out 16 months
7 ago or more -- a little less than 16 months ago, because we
8 decided this soon after the beginning of the case. We walked
9 down that road. It's taken longer, as it always does. Every
10 judicial proceeding, administrative proceeding, always takes
11 longer than it was supposed to. It took longer than it was
12 supposed to for many reasons -- and a bunch of other reasons.

13 But the bottom line is we got there. We got there
14 over the protections of the debtor. We got there after the
15 vigorous defense of the debtor by Mr. Kaplan. We got there,
16 and now we're being asked to go somewhere else? I fail to
17 understand how the dignity of the law is satisfied by that
18 approach.

19 MR. SCHWARTZ: Your Honor, one point of
20 clarification.

21 THE COURT: Certainly. Go ahead.

22 MR. SCHWARTZ: Your Honor, I've said earlier that Mr.
23 Benun at some point in time approached Fuji and asked for a
24 license to generally sell reloaded cameras. That's simply not
25 true. He did approach Fuji, and he did ask for a license, but

1 it was only with respect to new cameras to sell to 3M
2 Corporation. It wasn't generally with respect to all reloaded
3 cameras.

4 THE COURT: I stand corrected. Thank you.

5 MR. SCHWARTZ: Thank you, Your Honor.

6 THE COURT: Excuse me a moment.

7 (Pause)

8 THE COURT: All right. Certain things we didn't
9 discuss. The subpoena, for example. Let me just ask something
10 about the subpoena, and if we could just get sort of a quick
11 response. Is there still a continuing need as seen by Fuji for
12 response to the subpoena and deposition of Mr. Weber?

13 MR. ROSENTHAL: Your Honor, the overriding concern
14 that caused us to issue the subpoena still exists 20 -- I guess
15 it's up to \$26 million has gone to PRE and/or Polytech, and I
16 think we're entitled to find out exactly how and where and when
17 that went and why.

18 THE COURT: So as I understand -- I just want to
19 understand your position. Do you still -- you know, not
20 argue. Do you still want the documents and access to Mr.
21 Weber?

22 MR. ROSENTHAL: Yes, Your Honor, I do.

23 THE COURT: And may I ask this. Does this step by
24 Fuji with respect to the subpoena relate to the conversion
25 issue, the stay relief issue, the admin claim?

1 MR. ROSENTHAL: Your Honor, it does not relate to the
2 stay or the admin claim. It does relate to the conversion in a
3 way, because one of the contentions that we make is that the
4 operation of this debtor, aside from its lack of transparency
5 has -- every time we've lifted a rock, there's been a worm
6 under it. The best example of that --

7 THE COURT: All right. Just -- you know, I accept
8 your point that it relates to the conversion issue.

9 MR. ROSENTHAL: It relates to the conversion issue.

10 THE COURT: All right.

11 MR. ROSENTHAL: And I think that's the only fair
12 answer.

13 THE COURT: As you see it. Okay. Mr. Sirota?

14 MR. SIROTA: Judge, my only recommendation -- I
15 raised this with Mr. Greenberg yesterday. There seems to be an
16 insatiable appetite for information that we can never satisfy,
17 and we've seen allegations before of wrongdoing, none of which
18 were borne out. The only thing I can think of to keep the
19 costs under control in responding to this information request
20 is to do what we did with Jazz U.K., and that is -- and Mr.
21 Buechler's recommendation -- we agree that Mr. Horgan should
22 sort of, as the Committee accountant, be the honest broker
23 looking at these issues in the first instance and reporting to
24 the parties, and this way we could get to the bottom of their
25 inquiries through Mr. Horgan. He could issue a report if there

1 was some disagreement, and we could revisit whether Mr. Weber's
2 deposition was necessary. I just, for purposes of full
3 disclosure, understand that after Horgan issued his report on
4 Jazz U.K., Fuji then said we want all of the confidential
5 backup that went with it, and we were unwilling to produce
6 customer information and things that we felt were confidential
7 that we gave to Mr. Horgan. But as sort of a compromise, my
8 suggestion is why don't we put these issues before Mr. Horgan,
9 let him do a bipartisan review, and report to the parties. If
10 there's need for Mr. Weber's deposition after that, he'll be
11 produced.

12 THE COURT: Mr. Buechler.

13 MR. BUECHLER: Not acceptable, Your Honor. Simply
14 put, we asked for additional documents vis-a-vis Jazz U.K., and
15 we asked that they be for attorneys' eyes only pursuant to the
16 protective order. We were denied. We do not believe the
17 investigation done was to the extent that it could've or
18 should've been done. It's done. Mr. Horgan did his report.
19 We don't believe it accurately looked at what it should have,
20 and, therefore, we felt the need to embark on our own. There
21 are numerous instances where if you look at the course of this
22 case from day one to the transformation of the way it does
23 business when originally it was Jazz Hong Kong, now it is
24 Polytech and PRE getting millions of dollars each month --
25 millions of dollars -- and that potentially is taking the

100

1 profit of this company, the debtor, offshore. Because when you
2 do examine carefully the affidavits -- in particular the one
3 that Mr. Benun submitted to the Court of International Trade,
4 it appears to us on our math that the debtor is selling single-
5 use cameras below cost -- below its actual cost. That means
6 that profit, if there is is being left. Whether it's in
7 Polytech or PRE, Mr. Silvera, which has a connection back to
8 the Committee, it's now the current debtor's landlord who it
9 shares space with, and, who knows, may be the Phoenix in the
10 future, but it's discovery that we believe we need, because
11 with all due respect, the Committee has not done the
12 investigation that maybe it should've.

13 THE COURT: Okay. I think that resources are, of
14 course, an issue with an investigation, but let me address the
15 series of motions that is before the Court today. There's a
16 motion by Fuji to convert. There's a motion by Fuji to have a
17 certain administrative claim allowed. There's motion for
18 either relief from the stay or determination that there is no
19 stay affecting Fuji in its right to go forward to the District
20 Court to seek out an injunction with respect to the sale of the
21 disposable cameras.

22 There's a cross motion pending which is a function of
23 the last-stated motion. That if the stay is deemed not to be
24 in existence or is the subject of relief order of this Court,
25 that there should be retention of Mr. Frazza's firm for

1 representation. There's a dispute with respect to and a
2 motion to quash the subpoena that was just referred to, but
3 this Court centers on, as I stated early on, the conversion
4 motion, because that would answer many of the other questions
5 and deal with many of the other motions. And should this
6 Chapter 11 case go forward -- and I don't have a quick and easy
7 answer right now. I've expressed my concerns for the ITC
8 determination, the EID-2 as apparently not contested or agreed
9 to by ITC, and it is a substantial negative for the life of
10 this case.

11 I'm acutely aware of the Imation litigation, which
12 has now been delayed and deferred into January, and I'm acutely
13 aware of the pending appeal where oral argument was made in
14 early May before the Federal Circuit with respect to Judge
15 Hochberg's judgment. For interim purposes this Court will
16 continue all -- except the subpoena issue, all issues until
17 November 19th at 1:00, and we can discuss supplementary filings
18 which I would hope would be limited to input relating to
19 developments between now and November 19th, so we don't retrace
20 steps, or a sharpening of points raised at this hearing.
21 Having said that, I leave it to counsel to work out
22 supplementary submissions.

23 The Court reaches this conclusion to continue matters
24 which obviously continues the Chapter 11 at least until that
25 date. As a function of a series of considerations, it does

1 appear as though Customs is now activated in the enforcement
2 area. The ITC Customs role was agreed to by the parties, both
3 Fuji and the debtor, and though I'm not deciding that Fuji put
4 all of its eggs in the customs basket, if you will, it may be
5 that customs takes certain steps which will impact very
6 dramatically on the Chapter 11 case and particularly on the
7 conversion issue. And those activities in Customs are just not
8 ripened now, but they could ripen, as I hear it from Mr.
9 Peterson in particular, over the next few weeks.

10 The second factor is that there is at least an
11 allegation by the debtor that once again the process has
12 changed by the -- both the accounting process for first sales
13 and the refurbishment process sufficient to take the reloading
14 of these cameras out of what was determined to be objectionable
15 by the ALJ and EID-2. I'm not making a finding on that, but at
16 least there isn't stubbornness on the part of the debtor to
17 stay with the old program and simply appeal. Now whether
18 there's credibility in the change of process is a matter I
19 haven't focused on and may have to focus on.

20 Another factor that the Court will consider is that,
21 as Mr. Rosenthal says, the subpoena has relevance to the
22 conversion, and I will define the scope of the subpoena and
23 will not quash it and will order that Mr. Weber be produced,
24 and the documents we can talk about in particular. But I think
25 that the open book program is necessary, and if it's a fishing

1 expedition, so be it.

2 The possibility does exist that the ITC process will
3 become finalized in terms of the penalty phase between now and
4 November 19th, and the fact that seems to be likely -- I assume
5 that all submissions have been made to the ITC at this point
6 with respect to that, and so we can get some more insight, and
7 that's what I'm looking for, into what might be an
8 administration claim or might be a pre-petition claim and the
9 overall award generally.

10 There's also the possibility, though it's hard to
11 predict, that between now and November 19th the Federal Circuit
12 will decide the appeal from Judge Hochberg's judgment. That
13 will have broad implications in a number of directions,
14 including Imation, and the Court would hope to get some
15 instruction and insight there, though it may not happen. I
16 understand that it may not happen because of the timing.

17 The Court is particularly concerned, as it was
18 several months, in the spread of litigation in the attendant
19 costs moving the process in any degree to yet another court
20 here, the District Court, as applied for by Fuji. The Court
21 will continue its utilization of the equitable powers under 28
22 USC 959 to hold in for administration efficiency purposes the
23 litigation to this court except as we've already made reference
24 to the ITC.

25 The Court also feels that at least the continuation

1 which continues the life of the Chapter 11 case to November
2 19th for the stated reasons is reasonably consistent with the
3 earlier ruling with respect to the stay relief motion. We
4 still haven't come to the final phase in the ITC.

5 Now the Court is cognizant of the fact that there
6 may be an effect on both Fuji and the estates generally. There
7 is a potential that an admin claim will be increased. Mr.
8 Rosenthal makes the point that even if Customs holds out
9 containers of imported cameras, that there's an inventory that
10 might be sold which might be infringing. This is a marginal
11 cost, and it's not disregarded by the Court, but on balance the
12 short delay in between now and November 19th in the life this
13 case is relatively short. The Court is inclined to step slowly
14 toward a very drastic conclusion, if it should be reached, that
15 being conversion, in an attempt to get some of these other
16 benchmarks brought in the proceeding. And so will reconvene on
17 the 19th of November at 1:00.

18 With respect to the subpoena and its breadth in terms
19 of documents -- yes?

20 MR. BUECHLER: Just one other question in regard to
21 what you said before we jump into the subpoena. Two points.
22 One, you neglected to also on today's calendar is a motion to
23 both Jazz and Benun to extend exclusivity which we, Fuji, have
24 objected to and continue to object to.

25 THE COURT: Thank you. I do appreciate that.

1 MR. BUECHLER: Two. With regard to your decision to
2 adjourn Fuji's motions til November 19th, if the Federal
3 Circuit were to come down sooner -- sooner than then, would the
4 Court entertain a request by Fuji to have that hearing moved
5 up, because hypothetically that decision could come down next
6 Tuesday.

7 THE COURT: All right. If there's an event that
8 occurs and either side or any party in interest should feel is
9 telling, the Court's always available by telephone, and I would
10 have a conference with respect to that and certainly would
11 reconsider the November 19th date.

12 MR. BUECHLER: Thank you.

13 THE COURT: To the extent that the exclusivity issue
14 is on the calendar and to the extent that issues here also
15 relate to the Benun case, exclusivity will be continued until
16 November 19th, and the Benun issues will also be continued
17 until November 19th.

18 With respect to the subpoena, Exhibit A, documents to
19 be produced, paragraph one, in lieu of all documents or other
20 information that phrase will be removed and replaced with
21 documents sufficient to disclose information relating to.

22 Paragraph two, the same amendment -- documents
23 sufficient to disclose.

24 Paragraph three, in place of all with respect to
25 accountings, reconciliations, etcetera, the term available

1 accountings, reconciliations, summaries, etcetera.

2 Paragraph four, the same -- available instead of all.

3 Paragraph five, that sample documents used by Jazz
4 shall be produced.

5 Paragraph six, instead of all documents or
6 information, it will be a summary of documents or information.

7 Paragraph seven is as is.

8 Paragraph eight, instead of all, it will be principal
9 documents which account for.

10 Same thing in nine and ten.

11 Paragraph 11 is as is, and Mr. Weber will be produced
12 for deposition.

13 MR. SIROTA: Judge, is there a limitation as to how
14 long Mr. Weber can be deposed for? We've been down that road a
15 few times.

16 THE COURT: Mr. Buechler, are you dealing with this
17 matter? How much time do you need? An hour and a half?

18 MR. BUECHLER: No, Your Honor, we'd like to have an
19 entire day.

20 THE COURT: Okay.

21 MR. BUECHLER: And --

22 THE COURT: Entire day.

23 MR. BUECHLER: And some period of time, in which Mr.
24 Sirota can tell us now, that we'll get the documents, so we
25 can --

1 THE COURT: That's fair.

2 MR. BUECHLER: -- and then we can then work with Mr.
3 Sirota separately to fix a date.

4 THE COURT: That's fair, and you can -- I'm sure Mr.
5 Sirota will agree to a period of time following the production
6 of documents, so that you can properly prepare for the
7 deposition.

8 MR. SIROTA: Judge, we would ask for two weeks to
9 produce the documents. I just spoke with Mr. Weber.

10 THE COURT: Does that work for you, Mr. Buechler?

11 MR. BUECHLER: Two weeks from today is acceptable,
12 Judge.

13 THE COURT: All right.

14 MR. SIROTA: And then we'll fix a time thereafter.

15 MR. BUECHLER: That's perfect.

16 THE COURT: All right. Counsel, I do appreciate your
17 cooperation.

18 MR. SIROTA: Judge, with respect to forms of order,
19 would you like us to undertake the first cut, and we'll share
20 them --

21 THE COURT: Yes. Yes, and please provide the other
22 side, and let's see if we can get a form of order locked in on
23 particularly as to the active matter, but of course, the
24 continuations as well. Is there anything else that's open?
25 Yes, Mr. Buechler?

1 MR. BUECHLER: One other housekeeping item, Your
2 Honor. Next Tuesday --

3 THE COURT: Nine 28, the pretrial.

4 MR. BUECHLER: That's in the adversary --

5 THE COURT: I'd like to adjourn that if there's no
6 objection.

7 MR. BUECHLER: Mr. Schwartz and I spoke about that
8 before, because that's waiting again for the Fifth Circuit. I
9 don't know how far Your Honor wants to carry that --

10 THE COURT: I'll give you a November date for that
11 pretrial.

12 MR. BUECHLER: What's the date, Your Honor?

13 THE COURT: I beg your pardon?

14 MR. BUECHLER: I didn't hear Your Honor.

15 THE COURT: I'll give you a November date for that
16 pretrial. Let's put it down for holding purposes as November
17 23rd at 9:00.

18 MR. BUECHLER: One other, Your Honor.

19 THE COURT: Go ahead. We will need an order on the
20 exclusivity periods.

21 UNIDENTIFIED ATTORNEY: We'll submit one, Judge.

22 MR. BUECHLER: Well didn't they file that -- you're
23 talking about the motion that Mr. Sirota --

24 UNIDENTIFIED ATTORNEY: No, the --

25 THE COURT: Mr. Sirota's going to take the laboring

1 oar and --

2 MR. SIROTA: I'll just circulate that, and if we have
3 a dispute, you'll be the first --

4 THE COURT: Anything else, counsel?

5 MR. SIROTA: No.

6 THE COURT: Mr. Buechler?

7 MR. BUECHLER: Your Honor, all Mr. Rosenthal said to
8 me is last fall we had filed motions in the Benun case seeking
9 permission or authorization -- and I don't recall the exact
10 nature -- dealing with potential causes of action for
11 fraudulent conveyances. At that time we entered into
12 agreements with Mr. Seacrest here with his clients, which are
13 Mrs. Benun and the daughters, as well as several other
14 entities. Those tolling agreements expire by their own terms
15 in November or December of this year. I just want to alert
16 Your Honor the parties and Fuji will either make a decision as
17 to whether to reactivate those motions or discuss with those
18 same parties through their appropriate counsel whether they
19 will agree to extensions of the tolling agreements, but people
20 shouldn't be surprised with that --

21 THE COURT: Fair enough.

22 MR. BUECHLER: -- if there is the motion that the
23 debtor Jazz Photo filed dealing with the funds that come out of
24 the escrow from the ITC for the bond that they have filed,
25 which we will be submitting the papers in connection with when

1 they're due in the next week or so. I don't know the exact --

2 THE COURT: And on the horizon is Mr. Peterson's
3 firm's --

4 MR. BUECHLER: Correct. We've received those, and we
5 have some issues with those that will progress.

6 THE COURT: All right. I do thank counsel for high
7 quality of work. It always makes it easier, even in a
8 difficult case, and let's see where we go from here. Thank you
9 very much.

10 ALL: Thank you, Your Honor.

11 * * * * *

12 **CERTIFICATION**

13 I, PATRICIA C. REPKO, court approved transcriber,
14 certify that the foregoing is a correct transcript from the
15 official electronic sound recording of the proceedings in the
16 above-entitled matter.

17

18 /s/ Debra Storey Date: September 29, 2004
19 DEBRA STOREY

20

21

22 /s/ Patricia C. Repko
23 PATRICIA C. REPKO

24

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